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Vol. 23. NEW YORK REPORTS.

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Shows where the decisions in this volume have been cited — where to find precedents on their subjects from the courts carrying most weight in this state. The ANNOTATIONS referred to (marked n) give a complete presentation of authorities on the point in question—all the law.

N. B.—Cut out and stick each block on page at its head, or citations for entire volume on inside front cover.

Always consult this table before using a case.

9:1 LRA 422n	192:39 US 637	275:25 Fed 393	306:06 Con 405	465:4 Fed 618
8 LRA 824n	22 LE ^d 849	36 NJL 245	27 NJE 51	16 Fed 257
28:2 LRA 829n	22 Con 189	281:2 LRA 772n	2 LRA 396	56 Fed 444
5 LRA 536	42 Con 120	289:183 US 575	5 LRA 42n	82 Fed 684
35 LRA 383	35 NJE 505	33 LE ^d 686	11 LRA 86n	85 Fed 189
42:57 Fed 446	12 LRA 764	15 Fed 684	18 LRA 251	96 Mas 91
51 NJE 223	13 LRA 166n	42 Fed 197	37 LRA 331	121 Mas 7
9 LRA 717	224:74 US 150	148 Mas 558	38 LRA 350	143 Mas 306
10 LRA 211n	19 LE ^d 113	54 Con 406	38 LRA 671	2 LRA 70
13 LRA 322n	78 US 490	2 LRA 701	394:159 US 103	3 LRA 327n
13 LRA 398	20 LE ^d 194	7 LRA 855n	40 LE ^d 108	4 LRA 284
17 LRA 224	83 US 478	32 LRA 715n	8 LRA 322n	5 LRA 396
17 LRA 631	21 LE ^d 305	298:19 NJE 314	13 LRA 275n	13 LRA 450n
17 LRA 690	63 US 630	3 LRA 146n	420:13 LRA 512n	13 LRA 800n
17 LRA 731	21 LE ^d 498	4 LRA 144	430:32 US 499	18 LRA 436
24 LRA 107	121 US 162	5 LRA 36n	23 LE ^d 584	19 LRA 795
61:71 Fed 630	30 LE ^d 904	11 LRA 86n	101 US 674	21 LRA 471n
95 Mas 153	19 Fed 369	12 LRA 414n	25 LE ^d 1040	34 LRA 766
17 NJE 83	60 Fed 32	20 LRA 517n	10 Fed 10	35 LRA 476
45 NJE 554	42 Con 441	331:4 LRA 607n	55 NJE 23	498:10 LRA 208n
6 LRA 280n	34 NJL 428	335:94 US 551	1 LRA 87n	18 LRA 701
13 LRA 613	2 LRA 800n	24 LE ^d 287	7 LRA 764	25 LRA 818
15 LRA 415	2 LRA 862	38 LRA 365	8 LRA 251	510:81 US 604
17 LRA 642	3 LRA 466	343:121 US 646	14 LRA 490n	20 LE ^d 784
17 LRA 713	12 LRA 408	30 LE ^d 1051	456:70 US 670	138 Mas 31
69:80 Fed 873	23 LRA 96	8 LRA 206	18 LE ^d 84	28 NJE 169
119 Mas 544	34 LRA 235	12 LRA 338n	92 US 499	63 NJE 292
4 LRA 144	34 LRA 245	27 LRA 188n	23 LE ^d 584	5 LRA 809
5 LRA 36n	37 LRA 445	347:56 Fed 957	101 US 674	6 LRA 141
5 LRA 100n	37 LRA 519n	350:133 US 494	25 LE ^d 1040	12 LRA 409n
11 LRA 86n	242:44 Fed 25	33 LE ^d 632	10 Fed 10	14 LRA 283n
26 LRA 306n	34 NJL 428	27 LRA 606n	22 Fed 592	21 LRA 471n
85:30 Fed 675	9 LRA 496	357:54 Con 506	1 LRA 145	28 LRA 698
81 Fed 851	14 LRA 532n		4 LRA 691	527:51 Con 67
90:52 NJE 655	18 LRA 712		27 LRA 690n	539:33 US 388
4 LRA 437	19 LRA 224n			21 LE ^d 390
6 LRA 717n	252:3 Fed 161			138 US 250
7 LRA 804	30 NJE 133			34 LE ^d 927
12 LRA 414n	27 LRA 761			10 Fed 399
12 LRA 621n	264:57 Fed 662			550:13 LRA 295n
12 LRA 830n	99 Mas 256			564:32 LRA 483n
13 LRA 277n	5 LRA 428n			570:43 Fed 355
14 LRA 364n	10 LRA 783			35 LRA 650n
158:57 Fed 701	14 LRA 264n			
15 LRA 308n	21 LRA 207n			
21 LRA 819	24 LRA 422			
	25 LRA 522			
	26 LRA 152			

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VOL. 23—N. Y. COURT OF APPEALS.

9	131	2 58	252	71	5347	89	5237	495
25	1424		41	1 24	5352	97	5441	2k 592
95	1499		50	1604	5346	97	5467	3k 164
86	2419		60	1869	5245	105	5192	97 238
27	3 34		94	1 95	5620	108	5329	498
2k	234		L 99	1219	5345	111	5107	68 1253
52	1129		d 99	1220	575	135	5594	87 1291
62	635		145	1561		140	5 65	134 1366
84	2665		64	3 84	318	140	532	502
91	5446		99	3228	58 1509	52	5466	1k 1 30
95	528		71	610	59 1195	58	5112	508
					68 1824	70	5488	2k 1253
17					98 1229			
26	1158		26	1606	31 2197			516
4k	1 16		1k	1380	2k 2416	24	164	s 24 1654
84	1645		1k	1470	58 2 32	43	1438	44 1281
38	692		50	1855	58 2 45	46	1159	74 1534
			70	1494		53	1560	d 116 1390
28			73	1 61	331			26 2421
29	1172		122	1465	50 1165			46 2529
d 29	1176		37	2607	335	31	1608	103 3151
41	1587		38	2292	3k 1220	106	1410	
d 47	1520		1k	2450	48 1507	119	1294	527
1	271		86	2 83	69 1538	26	2471	32 1631
88	1342		127	2562	45 2742	28	2638	32 1646
98	1385		132	2 55	2k 2565	34	2522	54 1442
d 100	1541		24	1140	343	57	2186	54 1444
144	1895		2k	2647	46 1 28	66	2132	54 1604
c 41	2594		2k	2665	66 1457	92	2317	d 54 1624
			3k	2546	39 3883	24	2124	61 1118
35	1524		53	3465	64 3138	71	2523	76 2268
51	1480		67	3 4	73 2551	25	2298	539
58	1423		81	3108	25 5524	29	2626	s 28 1589
71	1 84		96	3107	30 2287	36	2224	29 1453
141	1525		127	2216	30 2238	55	1866	d 61 1 83
29	2642		143	2594	30 2240	55	1999	118 2149
36	2216				37 2564	62	2468	552
51	2481				3k 2273	86	2229	1k 1 79
88	2856		33	668	47 2509	62	2465	42 2 86
101	2107		33	672		82	2229	556
102	2111		35	69	347	84	2538	34 3119
L 103	2 19		49	641	126 1840			53 28
d 122	2 26							53 2227
d 122	2 34		281					61 1118
124	2608		48	1118				70 2558
134	2162		44	1319				564
135	2411		48	1 97				L 52 2645
139	2501		105	1303				570
L 140	2272		182	1325				29 659
118	2429		53	2484				29 665
			61	2429				
25	1529		104	2523				
36	1122		107	2844				
60	1610		129	2112				
64	1 71							
68	1253		26	1455				
90	1162		3k	1341				
118	1219		47	1442				
128	1259		90	1584				
131	1298		117	1894				
135	1345		114	2 34				
137	1322							
138	1191		293					
118	2222		95	2546				
45	1132							
49	2448		28	1382				
62	2649		34	1591				
122	2114		34	1592				
141	2801		c 34	1595				
			d 34	1844				
48	1432		52	1848				
52	1457		78	1248				
79	1614		99	1458				
89	1177		108	1829				
33	1126		33	2120				
			37	2 76				
			108	2833				

Continued.

REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

BY E. PESHINE SMITH,
Counsellor at Law.

VOL. IX.

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1867.

Entered according to Act of Congress, in the year MDCCCLXII, in the Clerk's Office
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J U D G E S

OF THE

COURT OF APPEALS

GEORGE F. COMSTOCK, Chief Judge.

SAMUEL L. SELDEN,
HIRAM DENIO,
HENRY E. DAVIES,

} Judges.

JOHN A. LOTT,
AMAZIAH B. JAMES,
CHARLES MASON,
JAMES G. HOYT,

} Justices of the Supreme Court, and
ex officio Judges of the Court of
Appeals, from January 1, 1861,
to January 1, 1862.

AN ACT IN RELATION TO THE JUDICIARY.

[Ch. 280 of 1847.]

"§ 5. The judge of the Court of Appeals elected by the electors of the State, who shall have the shortest time to serve, shall be the Chief Judge of said court.

"§ 6. Four justices of the Supreme Court, to be judges of the Court of Appeals, shall every year be selected from the class of said justices having the shortest time to serve; and alternately, first, from the first, third, fifth and seventh judicial districts, and then from the second, fourth, sixth and eighth judicial districts; and shall enter upon their duties as judges of the Court of Appeals on the first day of January, and serve as judges of said court one year."

Rec Dec 12. 1870

CASES

REPORTED IN THIS VOLUME.

	Page.		Page.
A.		Commissioners of Taxes, Hoyt	
Allen v. Cowan,	502	v.	224
Anthony, White v.	164	Commissioners of Taxes, Park-	
B.		er Mills v.	242
Barney, Sweet v.	335	Cobb v. Harmon,	148
Beekman, Bonsor v., 298, and		Cook, Miller v.	495
see	575	Cowan, Allen v.	502
Bonsor v. Beekman, 298, and			
see	575	D.	
Bellinger v. New York Cen-		Dagal v. Simmons,	491
tral Railroad Company,	42	Dana v. Munson,	564
Bergen, Briggs v.	162	Draper, Roosevelt v.	318
Bissell v. New York Central		Denniston, The People v.	247
Railroad Company,	61	Denniston, Fellows v.	420
Briggs v. Bergen,	162	Devlin, Smith v.	363
Bonnafé, Matter of	169	Dickens v. New York Central	
Bowers v. Tallmadge,	166	Railroad Company,	158
Bull v. Sims,	570	Downing v. Marshall,	366
Butterworth v. O'Brien,	275	Durando v. Durando,	331
Buffalo Savings Bank v. New-			
ton,	160	E.	
C.		Eighth Avenue Railroad Com-	
Carman v. Plaas,	286	pany, Sanford v.	343
Chamberlain v. The People, ..	85		
Caujolle v. Ferrié,	90	F.	
Chautauqua County Bank v.		Fassett v. Smith,	252
White,	347	Fellows v. Denniston,	420
Coffin v. Coffin,	9	Ferri, Caujolle v.	90
Commissioners of Taxes, The			
People v.	192	G.	
		Genoa, Town of, Starin v. ...	439
		Gould v. Town of Sterling ...	439

	H.		Page.
Harmon, Cobb v.....	148	New York Central Railroad Company, Bissell v.....	61
Hart, Stoddard v.....	556	New York Central Railroad Company, Dickens v.....	158
Hollister Bank, Matter of	508	New York Ice Company v. North Western Insurance Company,	357
Horner v. Wood,.....	350	Noyes, Wm. C., Argument of, in Beekman v. Bonsor,.....	575
Hoyt v. Commissioners of Taxes,	224		
Hunt v. Moultrie,.....	394		
	J.		O.
Jordan & Skaneateles Plank Road Company v. Morley, ..	552	O'Brien, Butterworth v.....	275
		Ocean Bank, Scott v.....	289
	K.		P
Knight, Seneca Nation v.....	498	Panama Railroad Company, Whitford v.....	465
		Parker Mills v. Commissioners of Taxes,.....	242
	L.	Plaas, Carman v.....	286
Lester, Power v.....	527	People, Chamberlain v.....	85
		People v. Commissioners of Taxes,	192
	M.	People v. Zeyst,	140
Manning v. Monaghan,.....	539	People, Nelson v.....	293
Marshall, Downing v.....	366	People v. Denniston,	247
Merritt v. Todd,	28	Phelps, Executor, v. Pond,...	69
Michael, Nichols v.....	264	Pond, Phelps, Executor, v....	69
Miller v. Cook,	495	Power v. Lester,.....	527
Monaghan, Manning v.....	539	People v. Smith,.....	53
Morley, Jordan, &c., Plank Road Company v.....	552		
Moultrie, Hunt v.....	394		
Munson, Dana v.....	564		
Mutual Benefit Life Insurance Company, Ruse v.	516		R.
		Roosevelt v. Draper,	318
	N.	Ruse v. Mutual Benefit Life Insurance Company,	516
Nelson v. The People,.....	293	Rules, General,	8
Newton, Buffalo Savings Bank v.	160		
Nichols v. Michael,.....	264		S.
North Western Insurance Company, New York Ice Company v.,.....	357	Sanford v. Eighth Avenue Railroad Company,.....	343
New York Central Railroad Company, Bellinger v.....	42	Starin v. Town of Genoa,....	439
		Seneca Nation v. Knight,.....	498
		Sweet v. Barney,	335

CASES REPORTED.

vii

	Page.		Page.
Sterling, Town of, Gould v. . .	439	Todd, Merritt v.	28
Summons v. Dagal,	491	Thomas, Whitney v.	281
Smith, The People v.	53		
Smith, Fassett v.	252	W.	
Smith v. Devlin,	363	White v. Anthony,	164
Sims, Bull v.	570	White, Chautauqua Co. Bank v.	347
Smith v. White,	572	White, Smith v.	572
Scott v. Ocean Bank,	289	Whitford v. Panama Railroad	
Stoddard v. Hart,	556	Company,	465
		Whitney v. Thomas,	281
		Wood, Horner v.	350
		Z.	
T.		Zeyst, The People v.	140
Talbot v. Talbot,	17		
Tallmadge, Bowers v.	166		

RULES ADOPTED JANUARY 25, 1862.

RULE 24. The printed Calendar for the present January Term, and for each succeeding January Term, shall stand as the Calendar for the entire year. Causes noticed and placed upon the Calendar for the January Term of any year, shall be considered as noticed for all the subsequent terms. Additional causes may be noticed for the March Term, 1862, which shall be printed with their appropriate numbers, and annexed to the Calendar. After the January Term in each year hereafter, no causes, except such as are by law entitled to a preference, will be permitted to be placed upon the Calendar without the direction of the court.

RULE 25. Judgments by default will not be allowed; nor will causes be reserved, or set down for hearing upon a particular day, except in extraordinary cases. When a cause is called in its order upon the Calendar, it must be either argued, submitted or passed. If either party appear alone, he may, at his option, be heard orally, or submit the Case upon his printed brief. If the appellant only appears, he shall furnish the court with the usual number of printed copies of the Case, and of his Points; if the respondent, he shall hand to the court the copies of the Case served upon him, and fourteen printed copies of his Points. The party thus appearing, and arguing or submitting his Case, shall hand to the clerk a printed copy of his brief, to be delivered, whenever called for, to the opposite party, who may at any time within twenty days after the hearing, furnish to each member of the court, and serve upon the opposite party a printed answer to such brief, which may be replied to in like manner at any time within fifteen days after such service.

RULE 26. The call of the Calendar at the second, and each subsequent term in the year, will commence at the point where it terminated at the previous term; except that causes placed upon the Calendar at the next March Term, if entitled by their date or otherwise to priority over the causes remaining upon the Calendar, will be first called. Causes which are passed and which of consequence go to the foot of the Calendar, will resume their original places upon the Calendar for the ensuing year.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

March Term, 1861.

COFFIN *et al.*, Executors, *v.* COFFIN.

The publication of a will may be made in any form of communication by the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will.

So, too, the testator's request to the witnesses, to subscribe the attestation, may be made through any words or acts which clearly evince that desire to them; and the publication may be incorporated with the request.

Accordingly, where one of the witnesses, in the presence and hearing of the other, whose attendance was by the testator's procurement, asked the testator, "do you request me to sign this [the paper lying before them] as your will, as a witness?" and the testator said "yes": *Held*, sufficient as a request to both the witnesses, and as a publication of the will.

That the draftsman of the will takes a legacy under it, is suspicious only in connection with other circumstances indicative of fraud or undue influence.

Secrecy in the execution of the will, contrived by the testator himself, regarded as in no wise impeaching it; nor a preference of collateral relatives over his wife, under the proved and presumable circumstances of the case.

SMITH.—VOL. IX. 2

Coffin v. Coffin.

APPEAL from a judgment of the Supreme Court in the second district, affirming a decision of the Surrogate of the County of Dutchess, refusing to admit to probate the last will and testament of Trustrum Coffin, deceased. The testator, a resident of the town of Washington, in said county, died in March, 1857, leaving a widow, Jane Ann Coffin, and a son, Henry T. Coffin, about eleven years of age, and no other heirs or next of kin. He left a will, which was executed in May, 1854, nearly three years before his death, whereby he disposed of his estate and appointed his nephews, Alexander H. Coffin, Hezekiah R. Coffin and Robert G. Coffin, his executors. The executors propounded the will for probate before the Surrogate, which was opposed by the widow and guardian *ad litem* of the son, on the following grounds: 1st. That the will was not executed according to the requirements of the statute. 2d. That it was obtained by fraud and undue influence. 3d. That the testator was incompetent to make a will. The executor, Alexander H. Coffin, drew the instrument and attended the testator at the time of its execution. In the course of the proceeding before the Surrogate, he renounced his appointment as executor, withdrew himself as a party and released or assigned a legacy which the will gave to him. Having taken these steps, he was examined as witness on the part of the proponents. The decree of the Surrogate, refusing probate, declared that the will was not published or attested according to the statute, and that it was obtained by fraud and undue influence. After affirmance of that decision, in the Supreme Court, the executors, Hezekiah R. Coffin and Robert G. Coffin, appealed to this court. Such additional facts as are material are stated in the opinion of the court.

Homer A. Nelson, for the appellants.

Amasa J. Parker, for the respondents

COMSTOCK, Ch. J., delivered the opinion of the court:

The objection that the testator was incompetent to make a will, being wholly unsustained by the proof, was abandoned

Coffin v. Coffin.

on the argument in this court. It was urged, however, that the execution of the instrument was procured by fraud and undue influence, and this point will be first examined. It appears that the testator, although an aged man, and doubtless somewhat enfeebled in his faculties, lived nearly three years after the will was made, and attended to such affairs as he had to transact. At the date of the will, he was in the enjoyment of his usual health. The transaction was kept a secret from his wife, and from the domestics belonging to his household. They were absent from his house on the day of the execution, but their absence and the secrecy of the act appear to have been contrived by himself, without a suggestion from any other quarter. He sent for his nephew, Alexander H. Coffin, who resided some three miles distant, and with whom, it seems, he had a previous understanding in regard to drawing the will, when the circumstances were considered favorable to such a purpose. Alexander H. Coffin had prepared himself with a book of forms, and when sent for he went to the testator's house, drew the will and attended to the formalities of execution. The attesting witnesses were two persons engaged in doing some mechanical work for the testator, and whose presence on that day, so far as we know, was procured by himself. In all these circumstances we see no evidence of coercion or fraud, or even of persuasion, which influenced the mind or conduct of the testator. On the contrary, they show very clearly that his acts were prompted by motives entirely his own. Secrecy and contrivance may undoubtedly be badges of fraud in the execution as well of wills as of other instruments; but when the circumstances of that character can be clearly traced to the mind or wishes of the testator himself, they cannot be received as having any tendency to impeach his testamentary dispositions.

We have been referred to the will itself as directing an unusual, if not an unnatural, distribution of the estate of the decedent, and as evincing the presence of some undue and fraudulent influence upon his mind. His property was worth about \$55,500. It consisted of the farm on which he lived, valued at \$28,000; of personal estate upon it, worth \$3,500; and of

Coffin v. Coffin.

bonds, mortgages, and other assets, estimated at \$24,000. His collateral kindred were a sister, Mrs. Rider, and ten nephews and nieces, the children of his brother. By his will he gave to his wife, absolutely, the sum of \$6,000, and one-half his furniture, in lieu of dower. To his son he devised the farm. He gave him also the personal estate situated thereon, the other half of the furniture, and \$7,000 in money. The value of this devise and of these bequests to the son was \$38,500. The estate given to him was, however, to remain under the control of the executors until he should become of age; and, in case he should die before that time, or without issue, it was subject to a limitation-over in favor of his sister and his nephews and nieces. To his sister the testator bequeathed the sum of \$3,000; and the residue of his estate he gave to his nephews and nieces, the children of his brother, according to certain proportions specified. The amount of the residuum would be about \$8,000. A. H. Coffin, who drew the will and was appointed one of the three executors, was one of the nephews, and the legacy given to him was \$400—the like sum being also given to several of his brothers and sisters.

In this plan of distribution and limitation, we see nothing so eccentric or extraordinary as to justify an inference that it was not in harmony with the testator's own well-considered wishes and intentions. His wife was so much younger than himself that he must have married her at an advanced period of his life, and she probably had not participated in the toils and cares which led to the accumulation of his estate. We are not informed of the particulars of their domestic life; but that confidence and affection on his part were attended with some reserve, is evident from the circumstance that he did not wish her to be acquainted with the execution or contents of his will. He gave to her, absolutely, a sum, the income of which would be quite sufficient for her support. Having done this, we can imagine the existence of motives, not at all unreasonable, which induced him to prefer his own kindred to her, or her kindred, in the further dispositions of his estate. He recognized the claims of a sister in the legacy which he gave to her, and also

Coffin v. Coffin.

of his brother's children to a very moderate extent, after making the most ample provision for his son. The contingent limitation of the son's share in favor of his sister and nephews and nieces, simply exhibits a preference which we cannot pronounce an unnatural one. And inasmuch as we find nothing in the will which cannot be accounted for according to sentiments and affections known to exist in common life, and which often influence men in their testamentary acts, so we have no right to infer, without other proof, that, in making such a will, the testator's own mind was not fully and freely expressed.

The circumstance, that the nephew who prepared the will was appointed one of the executors and is also a legatee, has been urged upon our consideration. Facts of this kind may, and do often, very justly excite the suspicion of courts, when fraud and undue influence are alleged. But it is not a rule or principle in the law of testaments that the draftsman of a will cannot be an executor, or cannot take a benefit under it. As men quite generally appoint some of their kindred to be their executors, the choice in the instance before us does not seem to be an unnatural one. Indeed, there would be some difficulty in suggesting a different choice, in the actual circumstances and relations of the testator. His son was an infant, and his wife does not appear to have been the object of his testamentary regard, except in the pecuniary provision which has been mentioned. To give her, moreover, the control of the son's estate, during his minority, would not be quite consistent with the motives which dictated the ulterior limitation in favor of his own kindred. In respect to the legacy or portion given to A. H. Coffin, the draftsman of this will, we find it so moderate in amount, and in such just proportion to the sums given to the nine other persons standing in the same relation to the testator, as to afford no ground for invalidating the instrument or any part of it. As I have observed, there is no rule of law which prevents a person who prepares a will from taking a legacy under it. In the language of Baron PARKE, in *Bullin v. Barry* (1 Curteis' Ecc. R., 687): "All that can be truly said is, that if a person, whether an attorney or not, prepare a will

Coffin v. Coffin.

with a legacy to himself, it is, at most, a suspicious circumstance, of more or less weight according to the facts of each particular case, in some of no weight at all, as in the case suggested, varying according to circumstances, for instance the quantum of the legacy, the proportion it bears to the property disposed of, and numerous other contingencies."

Having come, therefore, to the conclusion that the will can not be impeached on the ground of fraud in procuring its execution, the next inquiry is, whether it was published and attested with the requisite legal formalities. The evidence on this point is that of the two attesting witnesses and of the draftsman, Mr. Coffin. According to the testimony of the latter, there can be no doubt. He has sworn to all the particulars of execution, publication and attestation which the statute requires. His statement, however, differs considerably from that of the two attesting witnesses; and the Surrogate, in deciding against the will, seems to have discredited his account of the transaction in the circumstances where it differed from theirs. We have not the advantage of seeing and hearing the witnesses. As the case appears to us, without their actual presence, we should certainly incline to think the evidence of Mr. Coffin to be altogether the most reliable. That he had much greater intelligence in regard to a subject of this nature, cannot be doubted. Indeed, we have every reason to conclude that he had, before preparing this will, made himself fully acquainted with the formalities which the law required. From his situation and relation to the transaction, his attention must have been given to all the particulars; and his evidence is direct and positive. On the other hand, the subscribing witnesses were called to the presence of the testator for the purpose of attestation only; and their failure to state all the facts to which the other witness deposed may not unreasonably be referred to their want of attention or of memory. They were called to testify some three years after the fact; and it is not at all singular that they should have lost the recollection of some of the circumstances. Such would be our impressions, if the hearing were now an original one; but we prefer to place

Coffin v. Coffin.

the decision we make more distinctly on the ground that the will is valid according to the evidence of the attesting witnesses alone.

First, as to the publication. The statute requires that the testator, when he subscribes a will, or acknowledges its execution to the witnesses, shall declare the instrument to be his last will and testament. (2 R. S., 63.) But this declaration need not be in any particular form. Any communication of the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the requirement. (*Lewis v. Lewis*, 1 Kern., 226; *Brinkerhoff v. Remsen*, 8 Paige, 488; *S. C.*, 26 Wend., 325.) In the case before us, according to the evidence of the two attesting witnesses, one of them asked the testator if he wished him to sign or witness the paper as his will; to which the testator answered in the affirmative. As both the witnesses were present, this was a good publication as to both of them, if good as to either. We think it was sufficient, because it was in substance a communication that the paper was the will of the testator. There can be no doubt that such a declaration can be made in answer to a question, or even by a sign. It is only required that it be understandingly made, and this we have no reason to question in the present case. All the circumstances surrounding and attending the transaction demonstrate that the testator perfectly understood the nature of the act he was performing.

In the next place, as to the attestation. The statute requires two witnesses, each of whom must sign his name at the end of the will, at the request of the testator. Confining ourselves to the evidence of these two witnesses, the facts appear to be these: They were present at the testator's house on the day in question, by his own procurement, and for the purpose, as there is reason to believe, of witnessing his will. When the instrument was ready for execution and attestation, they were summoned to the room where the matter was transacted. They came there, saw the testator subscribe his name, and signed their names as witnesses. Before doing so, one of them asked

Coffin v. Coffin.

the testator if he requested him to sign the will as a witness; to which he answered in the affirmative. Both the witnesses then proceeded to sign; the draftsman denoting the place where their names were to be written. The testator, the draftsman and the witnesses were all at one table, and in close proximity to each other. The request to attest the will was in answer to the question thus put by one of the witnesses, and no other or different communication was made to the other. Taking this as substantially the true statement of the facts, the objection which has been urged is, that one of the witnesses attested the instrument without any request made by the testator. Now, the statute, it is true, declares that each witness must sign on such request. But the manner and form in which the request must be made, and the evidence by which it must be proved, are not prescribed. We apprehend it is clear that no precise form of words, addressed to each of the witnesses at the very time of the attestation, is required. Any communication importing such request, addressed to one of the witnesses in the presence of the other, and which, by a just construction of all the circumstances, is intended for both, is, we think, sufficient. In this case both the witnesses, by the direction or with the knowledge of the testator, were summoned to attend him for the purpose of witnessing his will. They came into his presence accordingly, and, in answer to the inquiry of one of them, in which the singular instead of a plural pronoun was used, he desired the attestation to be made. In thus requiring both the witnesses to be present, and in thus answering the interrogatory addressed to him by one of them, we think that he did, in effect, request them both to become the subscribing witnesses to the instrument. Any other interpretation of his language, and of the attending circumstances, would be altogether too narrow and precise.

Another point urged upon the argument deserves a brief consideration. The statute, in separate and independent clauses, besides the subscription of the testator, requires that he shall declare the instrument to be his will, and shall request the witnesses to sign it. In this case the publication, and the

Talbot v. Talbot

request that the witnesses should sign it as such, are both included in the testator's answer, when asked whether he wished to have the paper attested as his will. But this objection, we think, is not fatal. All that the statute requires is, that the act of publication, and the act of requesting the witnesses to sign, shall both be performed. These acts are distinct in their nature or quality, but their performance may be joint or connected. If a testator should say to the witnesses, "I desire you to attest this instrument as my last will and testament," the language would import, not only a request, but a clear publication of the will. This point has been so held by Mr. BRADFORD, the late learned Surrogate of New York, and for reasons entirely satisfactory. (3 Bradf., 353.)

On the whole, we are of opinion that the judgment of the Supreme Court and the sentence of the Surrogate must both be reversed, without costs of the litigation to either party, and the proceedings remitted to the Surrogate, with a direction to admit the will to probate.

LORT, J., took no part in the decision; all the other judges concurring,

Ordered accordingly.

TALBOT *et al.* v. TALBOT, impleaded, &c.

An order of the Supreme Court, reversing a Surrogate's decree admitting a will to probate, for error in law, and remitting the proceedings to the Surrogate, is a final determination in the Supreme Court, and is appealable to this court.

A widow, cited, but who does not appear or contest the probate of her husband's will, is a competent witness for the contestants, as against the objection that she is a party to the proceeding; and no formal order, dismissing her as a party, or otherwise providing for her examination, is necessary.

Where, on the hearing before the Surrogate, there is general evidence of the execution by the husband of a previous will, under which the widow would take the same provision as under the will offered for probate, the validity of the first will is to be assumed in support of the competency of the widow, as against the objection of interest.

Talbot v. Talbot.

APPEAL from a judgment of the Supreme Court, in the fourth district, reversing, on appeal, a decision of the Surrogate of Essex county, by which the will of Edward Talbot, deceased, was admitted to probate. The deceased left a widow, Mary Talbot; two sons, Edward (who was made executor, and who propounded the will for probate) and Charles, who contested it; a daughter, Jane Barnes; and the children of two deceased daughters. By the will, dated May 7, 1853, there was given a legacy to his wife of \$1; one to Jane Barnes of \$200; one to Charles Talbot of \$300; small legacies to the testator's grandchildren; and the residue was given to his son Edward. It was shown that the deceased died worth from four to five thousand dollars in real and personal property. The Surrogate issued a citation in the usual form, directed to the widow and next of kin by name. On its return, the proponent and Charles Talbot, Mrs. Barnes and her husband, and other legatees, appeared before the Surrogate and contested the probate; but nothing is said as to any appearance by, or on behalf of, the widow. The formal execution and attestation of the will was proved by the subscribing witnesses, Israel A. and Solomon Conery. They were cross-examined by the counsel for the contestants; and other witnesses were examined on either side upon the question of testamentary capacity, and on the allegation by the contestants that the deceased was intoxicated at the time he signed the will. Some of the testimony was given with a view to show undue influence on the part of Edward Talbot. It appeared that the deceased had executed a former will, some time during the preceding year, before the same attesting witnesses, and that it had been kept for him by Solomon Conery, one of these witnesses. On the occasion of executing the will in controversy, and immediately after it had been signed and attested, the deceased called for the former one, and, on its being given to him, he burned it. This will differed from the last one in giving somewhat larger legacies to his children and grandchildren, other than his two sons, and he made those sons, together, residuary legatees. The nominal legacy to the widow was the same in both wills.

Talbot v. Talbot.

While producing their evidence, the contestants called the widow of the deceased as a witness, but she was not received. The statement in the return, in this respect, is in these words: "Robert S. Hale, on behalf of the contestants, offered as a witness Mary Talbot, the widow of the deceased, to prove the incapacity of the deceased to make a will, and to prove undue influence on the part of the propounder, Edward Talbot, in its procurement. The witness is excluded, and the contestant excepts."

The evidence is further alluded to in the opinions. The appeal to the Supreme Court was by Charles Talbot and Mrs. Barnes and her husband; and the widow and the other legatees were made respondents. The widow answered the petition of appeal, admitting therein that the Surrogate's decree was erroneous. The judgment of reversal, by the Supreme Court, according to the opinion, proceeded upon the ground that the objection to the witness was for interest, and that the ruling was unwarranted, because, as it was considered, the interest of the widow was balanced, she taking only a nominal legacy by the terms of each of the two wills. If the last will was pronounced against, the other, it was thought, would be established, so that she would not gain or lose by the decision.

From the judgment of reversal, the proponent, Edward Talbot, appealed here.

Augustus C. Hand, for the appellants.

Amasa J. Parker, for the respondents.

SELDEN, J. Where an order or decree of a Surrogate, admitting a will to probate, is reversed by the Supreme Court upon a question of fact, and an issue is awarded to be tried at the Circuit, no appeal will lie to this court, for the reason that the order of the Supreme Court is not final. The matter is still pending in that court, and may be again brought before the general term, upon exceptions taken at the trial, or after motion to set aside the verdict. But it is otherwise where the

Talbot v. Talbot.

Supreme Court reverses the order for error in law, and remits the proceedings back to the Surrogate. The order of reversal in such a case is a final determination of the proceeding in the Supreme Court. Nothing remains to be done in that court; and if a new appeal is brought from a second decree of the Surrogate, it is a proceeding *de novo*, and not a continuance of the first appeal. Hence, after the Supreme Court had corrected its error in this case, in ordering an issue to be tried at the Circuit, instead of remitting the proceedings to the Surrogate, the order made became appealable to this court. (*Messerve v. Sutton*, 3 Comst., 546.)

Upon the hearing before the Surrogate, the parties contesting the will offered Mary Talbot, the widow of the testator, as a witness to impeach the will, on the ground of fraud and undue influence and of want of testamentary capacity. The witness was objected to and excluded, and the contestants excepted to the decision. If the Surrogate was right in excluding this witness, we should be compelled to look into the evidence to see whether he was also right in his conclusion upon the question of capacity and undue influence; but if, as the Supreme Court has held, he was wrong in such exclusion, then his decree was properly reversed, and it becomes unnecessary to examine the case at large.

Was Mary Talbot, then, a competent witness? The objection to her competency is placed upon the grounds, 1. That she was a party to the suit or proceeding, and therefore incompetent; and, 2. That she was interested in the result of the decision to be made.

The Supreme Court was, perhaps, right in assuming that those sections of the Code which relate to the examination of parties and interested persons as witnesses, do not apply to proceedings in Surrogates' courts. It has been so held by that court in several cases in which the question has arisen, and, as it will not affect the result, I shall, for the purposes of the present case, adopt that conclusion. It is doubtful whether the widow could be considered as a party to the proceeding before the Surrogate, in such a sense as to require her exclu-

Talbot v. Talbot.

sion, even under the strict legal rule which prohibits parties from being examined as witnesses. It is true, she was included in the citation; but she was not among those who contested the probate of the will, nor did she appear at all at the hearing.

But, conceding that she was to be regarded as a party within the rule, her examination should, nevertheless, have been permitted, unless she had some interest in the question to be determined. Although section 897 of the Code has no application to the rule, still that section is merely in affirmance of the equitable rule which previously obtained in the Court of Chancery; and there is no reason why that rule should not be applied to proceedings in Surrogates' courts, which partake more nearly of the nature of equitable than of legal actions. It was unnecessary to observe the forms prescribed by the Court of Chancery in such cases. Those forms were adopted for the sake of convenience merely, and were in no respect essential to the application of the rule.

The admissibility of Mrs. Talbot as a witness, therefore, depended entirely upon the question of interest. If interested, she was incompetent upon that ground alone, as section 898 of the Code did not apply, and the act of 1857 had not then been passed. She was, no doubt, interested to defeat the will sought to be proved, unless the Supreme Court was right in assuming that the effect of the subversion of that will would be to revive and establish a previous will, under which her rights and interests would be identical with those under the will in controversy.

It is said, on the part of the appellant, that there was no proof that the first will, spoken of by the witness Conery, had been duly executed. It is true, the proof in regard to its execution is not very explicit. The testimony on that subject, however, was drawn out by the appellant himself. Conery, the witness, was the person who drew both the wills. It is evident, from his testimony, that he perfectly understood the requirements of the statute. He swears that the first will was executed by the testator, and that he, together with another

Talbot v. Talbot.

person, signed it as witnesses. He also says that the appellant himself called upon him, the witness, to draw the second will, saying, at the same time, that his father was going to make a new will, and adds that the appellant had previously told him that the testator talked of getting the witness to draw another will. The cross-examination of the witness, Conery, on this subject appears to assume that the testator had made a previous will, and that his object in getting Conery to draw the will in question was to change the disposition of his property made in the prior will. This is, I think, sufficient to establish, *prima facie*, that the first will had been properly executed.

But it is suggested that, although the first will was duly executed according to the forms prescribed by the statute, it does not follow that it was a valid will. It might still, upon being propounded for probate, be rejected, upon the ground of the incapacity of the testator, or as having been obtained by fraud or undue influence. Hence, it is insisted, by some of my associates, that, until the first will was proved and established as a valid will, it could not be assumed that its effect would be to neutralize the interest of the widow. This position, however, cannot, in my view, be sustained. A will, in all respects duly executed according to law, is, *prima facie*, a valid will, and must be so regarded until the contrary is shown. The burden of proof, in all such cases, lies upon the party denying its validity. The question might be very clearly presented in this form. Suppose, upon the trial of an issue in a suit at law, a witness is offered who appears, *prima facie*, to have an interest in the event of the action, and, to remove the objection, it is proposed to show a will, in all respects properly executed: would it be a sufficient objection to the evidence that the will had not been proved, and that it might turn out to be invalid? I think not. Objections upon the ground of interest have been frequently met at the Circuit by the introduction of bonds, notes, and other instruments, which have never been judicially established; and I am not aware that an objection for that reason has ever been sustained. It is as true of such instruments as of wills, that they may be void for

Talbot v. Talbot.

incompetency, for fraud, and other causes; but such invalidity is not to be presumed. The law assumes the contrary, until the invalidity is shown. There is no reason why wills should be made an exception to this rule; and I have met with no authority to that effect.

It follows, that the Supreme Court was right in holding that the widow had no interest in the matter concerning which she was offered as a witness, and, hence, that she was improperly excluded by the Surrogate. The order appealed from must, therefore, be affirmed.

DAVIES, LOTT, JAMES and HOYT, Js., concurred.

DENIO, J. (Dissenting.) The alleged error of the Surrogate mainly relied on by the counsel for the contestants is, that the widow of the deceased was improperly excluded when offered as a witness on their behalf. This ruling is sought to be sustained by the counsel of the present appellant, not only on the ground of interest, which the Supreme Court assumed to form the basis of the Surrogate's determination, but because, as alleged, the witness was incompetent on account of being a party to the proceeding. It is impossible to say on what ground the Surrogate held the widow incompetent. No objection on the part of the proponent, to her being sworn, is stated; but the Surrogate, so far as appears, excluded the witness of his own motion. The objection of interest is not alluded to, nor any opportunity given to obviate it by a release or otherwise, if it existed. The objection that the witness was incompetent as a party to the proceeding, if a good one, was patent, and did not require to be pointed out. The officer had the record before him, and of course knew the precise relation which the witness sustained to the litigation; and if the law did not permit a person thus situated to be examined, it was quite correct for the judge to exclude him, unless the opposite party should consent to her being received. The first inquiry, then, is, whether she was incompetent on account of being a party to the proceedings, irrespective of any question of interest. At law the rule was

Talbot v. Talbot.

well established that a party to a suit could not be received as a witness, whether he was interested or not. (*Paok v. The Mayor, &c., of New York*, 3 Comst., 489; Cow. & Hill's Notes, 184, 187, 1548.) In Chancery the rule seems to have been the same, subject, however, to the exception that if a defendant desire to examine a co-defendant he might have an order allowing him to do so on showing by affidavit that the party sought to be made a witness was not interested in the matter to which he was to be examined. Where such order was obtained the party might be examined, subject, however, to all objections to his competency other than that he was a party to the suit. (Chancery Rules of 1844, Rule 78.) If being a party was not, *prima facie*, a disqualification, it would not be necessary to obtain an order; but the question upon receiving his testimony would be the same which arises when any person is proposed to be examined. A complainant cannot be examined on behalf of a co-complainant. (*Esleford v. De Kay*, 6 Paige, 565.) Proving a will before the Surrogate, under the statute, is not strictly a suit in court, though it is a judicial inquiry of the same general character. The executor, or other party propounding the alleged will, is required to procure and serve a citation, in the nature of process, against all persons who would be entitled to a share of the succession in case of intestacy. The persons cited may or may not, on the whole, be interested to oppose the probate, and they may appear, or abstain from appearing, according as their interests may seem to them to require; or some of those interested to defeat the alleged will may stay away, relying on a sufficient opposition being made by other interested parties who actually appear as contestants, and whose opposition would necessarily inure to their benefit. The judgment operates *in rem* and *in personam*. In the former aspect, when the will is established, the judgment declares the assets to be a fund to be distributed according to the directions of the will, and irrevocably attaches that character to them. As a personal judgment, it divests all the parties proceeded against of the rights which they would have had under the statute of distributions in the case of intestacy, and also all such as they

Talbot v. Talbot.

would have had under any former will which is revoked or superseded by the one attempted to be proved. This view of the effect of the proceeding shows that, upon principle, there is the same reason for excluding the testimony of the parties which would exist in a regular proceeding at law or in equity. No substantial distinction exists between the different proceedings in this particular. Still, as this rule is in all cases an arbitrary one, and is not founded on any very strong reasons, I should hesitate to extend it to a case to which it had not hitherto been applied. But I find that it is considered to prevail in the ecclesiastical courts in England, which courts, as is well known, have the jurisdiction of admitting wills of personal property to probate, exercising, in that respect, substantially the same jurisdiction which the statute of this State has vested in the Surrogate. A case referred to from the reports of these courts appears to me to recognize the rule as I have stated it to prevail in the late Court of Chancery. In *Arnold v. Earl & Newbee* (2 Lee, 380), there was a citation to prove a will, and the question was, whether Newbee, one of the parties proceeded against, as a next of kin of the deceased, could be sworn on behalf of the executor, who propounded the instrument. Newbee appeared, declared he would not oppose the will, and prayed to be dismissed, so that he could be a witness for the executor. The motion was opposed on behalf of another party, who appeared as next of kin. There was no suggestion that he was a competent witness while he remained a party to the proceeding; but the judge said that, having declared he would not oppose the will, he had judicially bound himself, and had thereby fully answered the purpose for which he was cited. He was, therefore, dismissed as a party, and was then sworn as a witness. The motion and the order would be absurd, if the general rule were not that a party to such a proceeding was incompetent to be sworn as a witness. In *Brush v. Holland*, Mr. BRADFORD, late Surrogate of New York, had occasion to examine this question incidentally, and concluded that none of the parties to a probate proceeding were competent witnesses. (3 Bradf., 240.)

Talbot v. Talbot.

In the present case, the widow of the alleged testator was a necessary party. She had not declared she would not oppose the probate, though she did not appear and offer any actual opposition; and no order had been obtained, dismissing her from the proceeding. The opposition which was actually offered by the other parties, however, inured as fully to her benefit as though she had formally appeared. I am, therefore, inclined to the opinion that, as the case then stood, she was incompetent to give testimony for another party, cited as a next of kin to attend the probate.

But I think, also, that she was an interested party. As the widow of the deceased, she was, *prima facie*, entitled to a share of his personal estate. But against this claim there were two wills, in each of which she was cut off, so far as regards personalty, with a nominal legacy. If the second will, which was sought to be proved, was valid, her claim was barred. If that will was invalid, perhaps the former one, if itself otherwise a valid will, would stand unrevoked, and she would still be barred. But the question as to the validity of the first will was not on trial. If, in the actual proceeding, the judgment had been against the will, the first one would not be judicially established. It would require to be propounded for probate, and then an opportunity would be afforded to attack it on the ground of want of testamentary capacity. If the intention of the widow was to contend for intestacy, both wills must be opposed, as they should successively be presented for probate. She had an interest to defeat the will now in question, for that would remove one obstacle in her way. If established, it would furnish a conclusive bar to her claim; but if defeated, her claim would be perfect, unless probate of the other will could be obtained. Now, a considerable part of the evidence which was given upon the question of capacity covered the period during which both the wills were executed. Charles Talbot, it is true, would not probably have opposed the first will, because in that he shared the estate equally with his brother; but the widow and the other next of kin, besides her sons, had a direct interest to oppose that will when propounded

Talbot v. Talbot.

for probate. When it came out incidentally that a former will had been executed, which was destroyed after the second one was signed, it is not to be conclusively assumed that it was a valid and perfect will when executed. It was indifferent to the question then immediately under consideration, whether that was its character or not; for, whether it was valid or not, it was revoked by the execution of the other, if the testator had then sufficient capacity to make a will.

Upon the whole, I think it clear that the widow was a formal party to the proceeding, and that she had a pecuniary interest to defeat the probate of the will. If the objection upon which the ruling, excluding her, was made, was based upon her being a party to the proceeding (as I think it should be considered), it was well taken, though the law should be that a mere formal party, without interest, would be competent. She was an interested party to the record. She was not competent under the act of 1847 (ch. 462), which authorizes the calling of an adverse party; for she was in the same interest with, and in no sense adverse to, the contestants who called her. The Code had no application to the case; for such proceedings as these were expressly excepted from its operation. (§ 471.) But if the Code governed the case, the witness would not have been competent; for, when the trial took place, interested parties were incompetent. (§ 399.)

I am, therefore, of opinion that the ruling of the Surrogate was correct, and the judgment of the Supreme Court should be reversed.

MASON, J., also delivered an opinion for reversal. COMSTOCK, Ch. J., concurred in the preceding opinion so far as it relates to the interest of the widow, but did not regard the objection that she was a party as requiring any formal order to obviate it.

Order affirmed.

Merritt v. Todd.

MERRITT v. TODD.

A promissory note, payable on demand, with interest, is a continuing security: an indorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time.

Whether, however, the lapse of time, or a failure to pay interest at the customary periods, may not subject the holder of a note after transfer to a defence existing in favor of the maker against the first holder, *Quæra*.

APPEAL from the Supreme Court. Upon the trial before Mr. Justice EMOTT, without jury, which was waived, he found these facts: On the 5th day of May, 1852, Obadiah Peck borrowed of the plaintiff \$2,000, and made his promissory note therefor on that day, payable on demand, with interest, to the order of Rufus L. Todd, who indorsed the note at the time it was made, with knowledge of the facts, and for the accommodation of Peck. The interest was paid on the note by Peck for three years (but whether annually or otherwise, did not appear). Peck became insolvent after the making of the note. On the 24th day of December, 1855, payment of the note was demanded of Peck and refused, and notice thereof given to the indorser. On these facts, the judge found, as a conclusion of law, that the demand of payment was not made within a reasonable time, and that the indorser was discharged. He gave judgment dismissing the complaint. The judgment was affirmed at general term in the second district, and the plaintiff appealed therefrom to this court.

E. W. Chester, for the appellant.

Amasa J. Parker, for the respondent.

COMSTOCK, Ch. J. There is a most inconvenient uncertainty as to the rule of law applicable to the question in this case—an uncertainty, not inherent in the subject, but which arises from the want of harmony, and still more, I think, from the

Merritt v. Todd.

want of an intelligible principle in many of the adjudged cases. The difficulty is not inherent, because there are two opposing principles, either of which would furnish a rule sufficiently clear and precise for the determination of this and all similar controversies; but the greater number of decided cases, while following neither one of those theories, do not suggest any other having the elements of certainty which belong to a rule of law.

In the light of one of these principles, the contract is interpreted according to its terms, that is to say, a promissory note, payable on demand, with interest, and indorsed, is regarded as a continuing security; so that, on the one side, the maker is not deemed in default until the money is actually demanded, while, on the other, the holder may make the demand when he pleases, and is not chargeable with neglect if he does not make it within any particular time. In this view, which gives the most obvious interpretation to the language of the contract, no dishonor attaches to such a note until payment is required and refused; and the indorser is held if notice of the refusal is given to him with due diligence. And this is the doctrine of the English courts. In *Brooks v. Mitchell* (9 Mees. & Wels., 15) a note of £1,000, payable on demand, with interest, had been indorsed and transferred several years after its date; and the question was, whether the indorsee took it subject to equities between prior parties. The court observed: "If a promissory note, payable on demand, is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note, payable on demand, is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily." Such was also the doctrine laid down in *Barrough v. White* (4 B. & C., 325).

The alternative, or opposing rule, is, that the holder of such a note as we are speaking of must, if he wishes to charge the indorser, make his demand of the maker without delay, or, in the language of the law-merchant, within a reasonable time. This is a rule sufficiently exact, if we give to the phrase, "rea-

Merritt v. Todd.

sonable time," its proper legal signification. In the sense of the law relating to bills and notes, these words exclude all delays, except such as necessity or convenience require. They call simply for due diligence in performing the act which is to be done. They have no reference to what may be a convenient time for the maker of the principal obligation to pay his debt; but they refer solely to the time within which the holder can conveniently make the necessary presentment or demand, or give the required notice. What is reasonable time, or due diligence, is settled in most circumstances by legal rules capable of a definite application to questions as they arise. In the formation of these rules, a supposed credit, or indulgence toward the debtor, has never entered as a circumstance or element, to be considered. Thus, in the language of the books, notice of the dishonor of a bill or note must be given to the drawer or indorser within a reasonable time. But where the parties reside in the same town or city, this reasonable time is held not to extend beyond the next day after the presentment for acceptance or payment. (Story on Notes, §§ 319, 320.) Where they reside in different towns or cities, and the notice is sent by post, it must be mailed early enough for transmission on the day following the dishonor. So, in the cases where presentment for acceptance is necessary, as in the instance of a bill payable at so many days after sight, or, according to some authorities, payable at sight, the presentment must be made within a reasonable period: it need not be made on the very day when the bill is dated, or when it comes to the hands of the holder; but the bill cannot be held for a single hour as a time instrument or obligation. It must be presented as soon as the circumstances will reasonably permit, reference being had to the distance of the parties from each other, to sickness and other casualties; but no time is allowed for the convenience of the person on whom the bill is drawn. The notion of a credit or indulgence due to him, in respect to the funds in his hands, does not enter at all into the calculation. These are well settled rules of the commercial law; and if promissory notes, payable on demand, in all cases fall within them, there will

Merritt v. Todd.

very rarely be any difficulty in determining whether such a note has been demanded in due season to charge the indorser. The demand must, according to these rules, be always made within a reasonable time, that is to say, as soon as the holder can make it; allowing, for his convenience, the next day after it comes to his hands, if the parties reside in the same town, or longer, according to their distance from each, and other circumstances which may reasonably prevent the prompt performance of the act.

We have these two principles, directly antagonistic to each other, by one or the other of which, questions like the one before us ought to be determined. We say this, because there is no intermediate ground to stand upon. A note payable on demand is either a continuing security, upon which a demand may be made in season at any time, or it is not, and then a demand must be made immediately, that is to say, on the next day after the holder receives the note, or within such additional time only as the circumstances of distance, &c., may require. If we depart from these rules, and attempt to find one lying somewhere between them, we are lost in uncertainty, and the community will never know how to transact business of this nature in safety. If we admit the theory that, by taking a demand note, some term of credit, of longer or shorter duration, is given to the maker, but yet a term not to be ascertained by an actual presentment and demand, then a question forever arises: what is that period of credit? And this is a question absolutely incapable of solution according to any principle intelligible in itself or capable of application to the dealings of men. If we say that such a note is not in dishonor for ten days, where the parties live near to each other, and that it need not be demanded within that time, what reason can be given for saying that it must be demanded within ten months? It seems to me plain that such obligations are due immediately for the purpose of charging an indorser, or letting in a defence against an indorsee which existed between the original parties, or else that they are not due for those purposes until the money is called for.

Merritt v. Todd.

Some authority can be cited in favor of both these opposing principles. As I have said, a note, payable on demand, with interest, is regarded in England as a continuing security, imposing no duty of presentment within any particular time. In this country, one of the earliest cases on the subject which I have noticed is that of *Field v. Nickerson* (13 Mass., 181), which sustains the opposite doctrine. In that case the note was payable on demand, with interest, and indorsed by the defendant for the accommodation of the maker. No demand was made until eight months after the date of the instrument. The question was, whether the indorsee was discharged by that delay. Chief Justice PARKER, in giving the opinion of the court, thought that such notes must be demanded within a reasonable time, in the sense of the commercial law, that is, as soon as the act could be conveniently done. He observed, in substance, that such a note, in respect to the duty of presentment, was like a draft payable at sight; and, if he was correct in that view of the question, the conclusion was plain, because, in regard to sight drafts, the rule is well settled. The holder must present them with due diligence, having no reference to the convenience of the drawee.

But a considerable number of later cases might be referred to, resting on less definite grounds, and tending very much to obscure the general question. In *Martin v. Winslow* (2 Mason, 241), there was a delay of seven months in presenting a note payable on demand, and it was held by Judge STORY that the indorser was discharged; but, in holding this, the doctrine was not asserted that immediate diligence must be exercised in making the demand, nor was it suggested that, if the delay had been a month or a week shorter, the indorser would not have been held. On the other hand, the Supreme Court of Massachusetts, in *Seaver v. Lincoln* (21 Pick., 267), held that a demand made on the seventh day after its date upon a note payable on demand, with interest, was in due season to charge the indorser. The holder resided eighteen miles from the maker and six from the indorser; but there was no suggestion or pretence that the delay was excused by any circumstances

Merritt v. Todd.

of that character, or that it could be accounted for at all by any convenience or necessity of the holder. Nor does the case assert, on the other hand, that such securities are of a continuing character, according to the doctrine of the English courts. In *Ranger v. Carey* (1 Metc., 369), the note was transferred by the payee one month after it was given, and the court held that it was not to be deemed as due and dishonored so as to be subject to a defence which the maker had against the original holder. In the following year the contrary proposition was determined by the same court, in reference to a similar note transferred eight months after its date. (*The American Bank v. Jenness*, 2 Metc., 288.) No reason was given for either decision, except that, in one case, the time was only one month, and in the other, eight.

The course of decision in our own State is not more satisfactory. The earliest case is that of *Furman v. Haskin* (2 Caines, 369), where it appeared that eighteen months had elapsed before the transfer of the note, and this lapse of time was held sufficient to admit a defence of the maker. It does not appear that the note was on interest. In *Sice v. Cunningham* (1 Cow., 397), the question was, whether the indorser was discharged by a delay of five months in demanding payment of the note from the maker. The court held that he was discharged; but, whether a delay for any shorter period would have the same effect, was not suggested, nor was any rule laid down for the determination of questions of this character. In the later case of *Wetley v. Andrews* (8 Hill, 582), the note was payable on demand, with interest, and it was transferred three or four weeks after its date. It was held not dishonored, so as to let in a defence of a want of consideration. In this case, the circumstance that the security was on interest seems to have been treated for the first time as quite material to the question. Judge COWEN observed, that "it would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half a year, a year," &c.; and he goes on to cite, with apparent approbation, the doctrine of the English courts, that such securities are of a

Merritt v. Todd.

continuing character, and cannot be considered as dishonored until payment is demanded and refused. In *Vreland v. Hyde* (2 Hall, 429), it was decided by the Superior Court of the city of New York that such a note, I mean one on demand with interest, could be demanded, and the indorser charged, nineteen months after its date. I do not think that the reasons assigned for that decision were very carefully considered, although the decision itself is in accordance with the conclusion to which I have arrived in the present case.

We are satisfied that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives, we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight-draft. Such a note, payable at a bank where the maker keeps his funds, will perform essentially the office of a check, imposing the duty of early presentment in order to hold the collateral parties. Drafts or checks are, however, almost universally used in such transactions. But, whatever may be the rule where the security is not on interest, we think that a note payable on demand with interest is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and a refusal to pay. The loan or forbearance of money may be for a definite or an indefinite time. If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the meantime, a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is, that

Merritt v. Todd.

it is indefinite or indeterminate, and ascertainable only by an actual call for the money; and if that be the meaning of the principal parties, the indorser must be deemed to lend his name to the contract with the same intention. The only rational alternative is, that the payee or holder of such a note must demand its payment on the same day, or the day after, he receives it, unless some necessity or convenience of his own will excuse a longer delay; and he must give immediate notice of the refusal to the indorser. But a demand thus quickly made would probably, in every case, violate the actual intention of the parties, and it ought not, therefore, to be required as a rule of law for any collateral purpose. It should not be required in order to charge an indorser, if the act would not be consistent with the fair interpretation of the principal contract. In short, we see no good reason why a note, like the one now in question, should not be construed precisely according to its terms; and if we follow that construction, such instruments are not dishonored by the mere effluxion of time which is provided for in their own language. It may be well to observe that the present question is not identical with the one which arises where, after the transfer of such a note, the maker seeks to introduce a defence existing against the first holder. The lapse of time, or the non-payment of interest after the regular period or periods for such payment have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, that a demand had been actually made and notice given to the first indorser so as to charge him, while, at the same time, the maker would be let in to defend, if he had any defence. Questions of charging the indorser, therefore, and questions of allowing an original defence to the maker, may depend on very different considerations.

On the whole, we are of opinion that, in the case before us, the indorser was duly charged by the actual demand upon the maker of the note and by the notice of his refusal to pay. In arriving at this conclusion we are aware that we go somewhat

Marritt v. Todd.

beyond many adjudged cases, and that the decision is in conflict with some of them. Yet we go no further than the principle of other cases fairly leads us; and we have the satisfaction of believing that the rule we lay down is not only just in itself and tends to uphold dealings according to their actual intention, but that it will promote certainty in a branch of the law where certainty is eminently desirable.

The judgments of the general and special terms of the Supreme Courts must be reversed, and a new trial granted, with costs to abide the event.

SELDEN, DENIO, DAVIES, MASON and JAMES, Js., concurred.

HOYT, J. (Dissenting.) The important question in this case is, whether the indorser of a promissory note, payable on demand, with interest, is discharged from his liability when a demand of payment was not made of the maker until more than three and a half years after its date.

It was held in this State, as early as 1805, in the case of *Furman v. Haskins* (2 Caines' R., 369), that a note payable on demand must be presented, within a reasonable time after its date, for payment, or it will be considered as a note out of time and dishonored; and, what is a reasonable time, is a question of law, when the facts are ascertained. In that case, the note was transferred eighteen months after its date, and the court held it must clearly be considered as placing the note in the situation of one due and dishonored, and as imposing on the indorsee that risk. The case arose upon a demurrer to a plea setting up equities between the original parties to the note; and the court held the plea good.

In 1806, the case of *Hendrick v. Judah* (1 J. R., 319) was decided. That was an action upon a promissory note, made in England, payable on demand; and the suit was brought against the maker. On the trial, evidence of a set-off against the payee was offered and rejected unless it should be first shown that the note was transferred after it became due. The Supreme Court held that the evidence was properly rejected, and said:

Merritt v. Todd.

"The action was brought within a year after the date of the note, so that it must have been transferred within that time. It may have been indorsed soon after its date; and as the transaction was in England, we may intend that to be the case, as no evidence to the contrary was offered." The court evidently would have allowed the set-off in that case, but for the presumption of the early transfer of the note. And it has since been held that the presumption of law is, that the indorsement is contemporaneous with the making of a note, or, at all events, was antecedent to its becoming due. (*Pinkerton v. Baily*, 8 Wend., 600.) The case of *Loose v. Dunkin* (7 J. R., 70) was decided in 1810. The note was payable on demand, with interest, and was transferred two and a half months after its date. The court held that evidence of partial payments to the payee before transfer was properly admitted, and affirmed the judgment. The same principle was decided in the case of *Loomis v. Pulver* (9 J. R., 244), as to notes payable on demand and transferred two years after date. In that case the plaintiff sued the payee to recover back money paid on the note before it was transferred. The court held that he should have set up the payments when sued on the note by the indorsee, and, therefore, could not recover. In the case of *Sice v. Cunningham* (1 Cow., 397), decided in 1823, the action was against the indorser of a promissory note, dated on the 15th February, 1819, payable on demand, with interest; and it had been indorsed for the accommodation of the maker to secure a loan of money. The parties all lived in the city of New York. The maker was in good credit when the note was given, but stopped payment about the 23d of July, five months after the date of the note, on which day payment was demanded and refused, and notice given to the defendant. The Supreme Court, after full argument, held, unanimously, that the defendant was not liable. This case cannot, in any of its material features, be distinguished from the case under consideration. It has stood for nearly forty years, and has never, so far as I have been able to discover, been questioned by the Supreme Court or court of last resort in this State. The only cases

Merritt v. Todd.

cited by the plaintiff in this State, in which it is claimed a contrary rule was adopted, are the cases of *Vreeland v. Hyde* (2 Hall's Superior C. R., 429), and *Wethey v. Andrews* (3 Hill, 582).

In *Vreeland v. Hyde*, the action was upon a note payable on demand, with interest, without default or defalcation.

The Superior Court say: "It is settled in our courts that a note payable on demand must be presented for payment within a reasonable time, and notice given to the indorser; and, when the facts are ascertained, what is a reasonable time is a question of law;" and refer to the cases of *Sice v. Cunningham* (*supra*), and *Furman v. Haskins* (*id.*) They then say, every case must, in some measure, depend upon its own circumstances. They do not profess to disturb or doubt the correctness of those cases, but attempt to distinguish the case then under discussion from them. The note in that case had been given about twenty-one months when payment was demanded. The court say, the note was given for a loan of money, and upon interest, and that the interest was paid and indorsed on the note at the end of the year. They say, that the note "evidently was not made for the ordinary purposes of mercantile negotiations. This is apparent from the phraseology of the note itself, and the caution *with which it is worded*. It is payable on demand, with interest, and is to be paid by the makers without default." "This is sufficient (it is said) to show that the indorsement of the defendant was obtained under no ordinary circumstances, and that the maker had assured him he should come to no harm by his act of indorsing. That the note itself bears evidence upon its face that it was given to secure the repayment of a loan; and that it was not to be demanded at the usual time; and that the indorser was considered in the light of a security or guarantor." * * * "The rule requiring presentment within a reasonable time was intended for, and is applicable to, negotiable instruments, *made for commercial purposes only*."

I cannot assent to the doctrine that two notes, drawn and indorsed precisely alike, are to be held to import a different

Merritt v. Todd.

obligation upon the maker, indorser or holder, upon the consideration whether it was given for a loan of money or for commercial or other purposes. The only difference, in fact, between the note in the case last mentioned and the note of *Sice v. Cunningham*, consists in the words, "without default or defalcation." The court seem to assume that there was a difference in its being given upon interest and for money loaned. But a careful examination of the case of *Sice v. Cunningham* shows that the note in that case was given in the same manner and for the same purpose. In the statement of that case (1 Cow., 397), it is not stated whether the note was or was not on interest. But, at page 398, in stating what occurred in submitting the case to the jury, it is said: "That it was contended by the plaintiff's counsel that that note did not stand upon the footing of ordinary commercial paper; that it *was deposited for a loan of money, and drawn payable with interest*; and, therefore, the usual strictness in regard to presentment and notice was not required." Besides, SUTHERLAND, J., in his opinion, treats it as a note on interest.

In the case referred to in 3 Hill, 582, the action was against the maker, and the question was, whether he should be permitted to go into the consideration of the note. The payee had sold the note within a week after its date, and it had been again sold to the plaintiff within two, three or four weeks thereafter. The note was payable on demand, with interest. The court held the note was not to be deemed dishonored so as to let in the defence, and laid some stress upon the fact that the note was upon interest. "It would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half-year, year," &c. Even this rule would discharge the indorser in this case, for here three and a half years were suffered to elapse before a demand of payment.

The plaintiff's counsel has referred to two or three English cases, and claims that the law there is settled in his favor. *Barough v. White* (6 Dow. & Ry., 379), was an action by the indorsee against the maker of such a note, and the defendant

Merritt v. Todd.

offered to prove the admissions of the payee showing that he gave no value for the note. The payee was not called as a witness, although he was in court. It was held that these declarations were properly rejected. This was sufficient to dispose of the case; but some of the judges thought the note should not be treated as overdue, and LITLEDALE, J., thought the note was not overdue; that it was intended to be a continuing security; and that they could not treat it as overdue without payment having been demanded. Although this question of letting in the defence, if proper proof had been offered, was not necessary to the decision of the case, still it has been treated, in the two subsequent cases cited, as a leading case on that subject. *Brooks, assignee, &c., v. Mitchell* (9 Mees. & Wels., 15), was an action of trover to recover of the indorsee the amount of a note transferred by the bankrupt. The jury found that the payee indorsed the note to Boyle before bankruptcy, and that Boyle subsequently indorsed it to the plaintiff for value. But as to the question whether Boyle gave value for it, there was no sufficient evidence to the contrary. The court said, a promissory note, payable on demand, is intended to be a continuing security, and that it is quite unlike a check, which is intended to be presented speedily.

The case of *Gascoyne v. Smith* (1 McLeland & Younge, 388) was also an action by the indorsee against the maker of a note payable on demand, with interest until paid; and the question was, whether it was subject to the equities of the original parties under the peculiar circumstances of the case, the maker having recognized the validity of the note by paying interest to the holder. The court held the plaintiff was entitled to recover, and that a note payable on demand, with interest until paid, is not to be considered as payable instantly. It will be observed that none of these English cases involve directly the question of the liability of an indorser of such a note, nor what would be deemed laches as to him.

The relation of the indorser of a promissory note like this is precisely the same as that of the drawer of a bill of exchange payable on demand or at sight. The indorsement of such note

Merritt v. Todd.

is an order by the indorser to the maker, who, by his promise, is the debtor, to pay the money to the indorsee. This is the exact description of a bill of exchange. (6 Bacon's Abr., 771, tit. Merchant and Merchandise, No. 2.) The indorser of the note is the drawer; the maker the acceptor; and the indorsee is the person to whom it is made payable. (2 Burr, 676; 9 J. R., 120.)

There is, I think, no good reason for a distinction as to what is necessary to charge the indorser of such a note, and the drawer of a bill of exchange payable on demand. (6 T. R., 677; Chitty on Bills, 379.) The law is well settled that, to charge the drawer of a bill of exchange, or check, payable on demand, or at sight, it must be presented within a reasonable time, which ordinarily means that it must be presented, or remitted for presentation, the same or the next day after it is received, unless put in circulation by indorsement to other parties. (Chitty on Bills, 379, 381; *Cambridge v. Allenby*, 6 Barn. & Cress., 373; *Smith v. James*, 20 Wend., 198; *Lough v. Statts*, 13 id., 351; *Mohawk Bank v. Broderick*, 13 id., 133; *Harker v. Anderson*, 21 id., 372.)

The law being, as I conceive, well settled that the liability of the indorser of a note payable on demand is substantially that of a drawer of a bill of exchange, and that, to charge the latter, it is necessary that the bill should be presented within a reasonable time, as before indicated, there is no good reason why the same rule should not be applied to the indorsement of such a note. And it having, as has already been shown, been for fifty or sixty years the settled doctrine of the Supreme Court in this State, that such a note must be presented within a reasonable time to charge the indorser, the course of decision on that subject should not now be departed from without a manifest necessity therefor. It is of the highest importance that the law, especially so far as it relates to commercial paper, should be uniform, and, once settled, should be adhered to. The community adapts itself to the law, as it is, at least, supposed to be settled; and, I think, in this case, we should assume that the parties contracted with reference to the law on that subject, as it had been apparently settled in this State. What-

Bellinger v. The New York Central Railroad.

ever might have been our conclusions as an original question, I do not now think we should depart from the course of decision referred to.

Therefore, without discussing the question, as an original one, upon its merits, I think we should regard it as settled in this State that such a note, under the circumstances disclosed in this case, should be deemed dishonored long before the time it was protested, and the indorser discharged. The judgment should be affirmed.

LOTT J., also dissented.

Judgment reversed, and new trial ordered.

BELLINGER v. THE NEW YORK CENTRAL RAILROAD.

One who, without legislative authority, interferes with the current of a running stream, is responsible, absolutely and without regard to actual negligence, for the damages sustained in consequence of his interposition by those who are entitled to have the water flow in its natural channel. Where, however, such interference is in pursuance of legislative authority, granted for the purpose of constructing a work of public utility, upon making compensation, the party obstructing the stream is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods.

APPEAL from a judgment of the Supreme Court. The action was commenced in May, 1855, to recover damages against the defendant for "negligently, wrongfully and improperly" constructing its road across the West Canada creek, and across the lowlands forming the valley of said creek, in the town of Herkimer, by means of which the plaintiff's lands in the valley on the east side of the creek were repeatedly overflowed, the soil, fences and manure washed away, and large quantities of rubbish left upon the ground, &c. The defendant's corporation was created in 1853, pursuant to an act of the

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134	182
23	42
186	411
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139	501
23	42
140	272
23	42
141	525
23	42
151	162
23	42
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162	590
23	42
169	283

Bellinger v. The New York Central Railroad.

legislature consolidating certain railroad companies into one company, and subjecting it to all the liabilities attaching to the companies embraced in the consolidation. Among these companies was the Utica and Schenectady Railroad Company, a corporation created by act of the legislature, whose road, as it was alleged, caused the injury, prior to the consolidation.

The West Canada creek runs in a southerly direction, discharging its waters into the Mohawk river in the town of Herkimer. The Utica and Schenectady railroad was constructed in 1835. Its general direction is east and west, and it crosses the creek in that town at a place easterly of the village of Herkimer, and runs on an embankment over the low land between the creek and the village, about one hundred and fifty rods. The bridge on which the track runs over the creek is nearly five hundred feet long. It replaces a former bridge of the company, which was carried off in 1851. There is a space of eighty-two feet wide in the embankment, for water to pass in the time of flood, over which space the track passes on what is called a flood bridge. In other parts the embankment is from four to twelve feet high, and there is a culvert four or five feet high near the west end of the embankment. The plaintiff's land, which was alleged to have been injured, is on the east side of the creek, below the railroad track, and between it and the Mohawk river. It was shown that the railroad company had acquired title to the land occupied by the track of its road, and that the plaintiff had received payment for the value of his portion of that land, and for his damages in consequence of the road having been laid out through it.

The plaintiff's land was not overflowed periodically, but only in times of unusual freshets, occurring in the winter and spring, when the flow of water is obstructed by the ice which has broken up and lodged in the channel and openings. Such a freshet occurred in the winter of 1842-3, carrying off the flood bridge, and in 1851 when the turnpike and railroad bridges, spanning the creek, were carried off, and again in 1853. On each of these occasions the plaintiff's land was covered with ice and strewed with floodwood and rubbish; the soil was

Bellinger v. The New York Central Railroad.

washed off in places, and the fences carried away. Several of the plaintiff's witnesses attributed this effect to the railroad embankment, west of the creek. They testified (in effect) that if such an obstruction had not existed, the water which came out of the channel on the west side of the creek, above the railroad, would have spread out and passed off on the low lands on that side; but that, owing to the embankment, and to the ice filling up and obstructing the space at the flood bridge, the water turned and ran east into the channel, broke up the ice in it, which was again obstructed by the fixed ice in the channel below the railroad bridge, and the whole was thrown upon the plaintiff's land east of the creek. On the other hand, the defendant's engineer, in charge of that part of the road, testified that upon these occasions the space at the flood bridge was not clogged by the ice, but passed off the water freely. It was shown by an aged witness that he had seen the ice and water overflow and run upon the plaintiff's land on the occasion of the breaking-up of the spring of 1799, and another witness saw the water on his land in 1813 or 1814. It appeared that, in both the freshets of 1842 and 1851, the ice in the creek was raised and thrown upon the banks a considerable distance above the place in question, and that several bridges and dams situated on the creek, above and not within the influence of the railroad embankment, were carried off. These were sudden and violent floods occurring after a rain, while the earth was frozen and covered with snow and the stream was frozen over. The West Canada creek was shown to be a violent stream, especially when breaking up in the spring.

The defendant's counsel moved for a nonsuit, on the ground that it had not been shown that there was any want of care or skill in the construction of the railroad or bridges, or that the injury to the plaintiff's land was owing to any such want of care or skill on the part of the railroad company. The motion was denied, and the defendant's counsel excepted.

The defendant's counsel called as a witness one Gilbert, who testified that he was an engineer, and had been engaged in that

Bellinger v. The New York Central Railroad.

pursuit for twenty-five years, and had been in the employment of the Utica and Schenectady Railroad Company for a time in 1847 and 1848, and in charge of the portion of their road embracing the place in question, and was familiarly acquainted with the embankment across the valley of the creek, of which and of the bridges he exhibited a map, which he swore was accurately drawn. The defendant's counsel, among other questions, asked him the following: "Were the embankment and the bridges carefully and skillfully constructed, with reference to this creek?" The plaintiff's counsel objected to the question as incompetent, and it was excluded by the judge, and the defendant's counsel excepted. The judge charged, among other things, "that the railroad company had a legal right to build its road in its present location, but, in building it, was bound to exercise due care. If it became necessary to pass over streams, sufficient openings should be left for the water to pass through in high as well as low water. The company is not bound (he said) to insure against any possible contingency, but it is bound to see that the openings are sufficient for any freshet which might reasonably be expected to occur in the stream for which it was made." The defendant's counsel excepted to this part of the charge. Verdict for the plaintiff, \$525.75, for which judgment was entered, which was affirmed at a general term. The defendant appealed.

Sidney T. Fairchild, for the appellant.

Robert Earl, for the respondent.

DENIO, J. The defendants had a right to construct their railroad across the creek and the low lands on each side of its channel, at the place where it was built; but they were bound to do this with all necessary care and skill, so as to save the adjacent proprietors from any injurious consequences which might arise on account of the necessary modification of the natural surface of the ground, so far as should be reasonably practicable. This was the substance of the charge of the judge.

Bellinger v. The New York Central Railroad.

He told the jury that the company was not bound to guard against every possible contingency, but that they were bound to see that the openings were sufficient for any freshet that might reasonably be expected to occur in the stream. In this, I think, he stated the rule with substantial accuracy; though I am of opinion that the principles of the action were not as fully explained as was desirable. But no request to supply the deficiency was made by the defendant's counsel. The exceptions to the charge cannot be sustained.

I am of opinion, though not without some hesitation, that there was evidence enough to submit the case to the jury upon the question whether the road and its embankments and bridges were constructed with suitable care and skill. There was no evidence directly bearing upon the point, by any witnesses of competent knowledge and experience. But the fact that, on three several occasions between the time of the construction of the road, in 1835, to the trial, in 1856, the water and ice had been forced out of the stream upon the plaintiff's land; and that, in the judgment of witnesses who had seen the breaking up of the ice, the diversion of the flood from its natural course on the west side, where it would have been harmless, to the creek and on to the land on the other side, was caused by the embankment, and the want of sufficient apertures for the passage of the water, afforded some evidence that the structures referred to were faulty. When the character of the stream, the peculiar suddenness and violence of the freshets which caused the injury, and their infrequency, are taken into consideration, it is evident that the plaintiff's case was not a strong one; but I think it was one to be determined by the jury. I am, therefore, in favor of sustaining the ruling of the court, in denying the motion for a nonsuit.

But the judge refused to allow the inquiry to be made of a witness, who was an engineer by profession, and who was familiar with the locality and with the defendant's structures, whether the embankment and the bridges were carefully and skillfully constructed with reference to the creek. It does not appear upon what ground the question was rejected by the

Bellinger v. The New York Central Railroad.

justice who presided at the trial. But the opinion of the court, given at the general term, upon the appeal there, puts the right to recover upon the sole question whether the propulsion of the ice and water upon the plaintiff's land, during the freshets referred to, was occasioned by the erection of the defendant's structures. If this is the true question, the inquiry made of the engineer, Gilbert, was immaterial; for, whatever skill and judgment may have been applied to the construction of the road, and though no fault whatever was imputable to the defendants or their servants, they were still, upon this doctrine, responsible for the damages, provided they would not have arisen if the railroad had not been constructed. This, as we have seen, was not the theory upon which the case was given to the jury at the Circuit; and, hence, the opinion of the general term consistently declares that the charge was more favorable to the defendants than the law would warrant. The general term proceeded to state, in effect, that the defendants, though authorized by law to construct the road on the course on which it is located, are still liable for any interference with the water, either that which would ordinarily flow in the stream or that which is superinduced by a freshet, to the prejudice of a third person, to the same extent that a private individual would be liable for similar acts upon his own land. If this be a correct statement of the law, the question of negligence, or want of due skill and judgment, in the construction of the road, was not in the case; for I suppose that the maxim, *aqua currit et debet currere*, absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner, upon any pretence, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care. If one chooses of his own authority to interfere with a water-course, even upon his own land, he, as a general rule, does it at his peril, as respects other riparian owners above or below. But the rule is different where one acts under the authority of law. There he has the sanction of the State for what he does, and, unless he commits a fault in the manner of doing it, he is completely justified.

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Bellinger v. The New York Central Railroad.

This is, of course, to be understood as limited to cases in which the legislature has the constitutional power to act. If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority would be wholly void, and, of course, could afford no protection to any one. But this limitation has no application to cases where property is not taken, but only subjected to damages consequential upon some act done by the State or pursuant to its authority. Some doubt at one time existed as to this distinction; but the question was directly presented in *Radcliff's Executors v. The Mayor, &c., of Brooklyn* (4 Comst., 195); and it was there determined, by the unanimous judgment of the court, that, where persons are authorized by the legislature to perform acts in which the public are interested, such as grading, leveling and improving streets and highways and the like, and they act with proper care and prudence, they are not answerable for the consequential damages which may be sustained by those who own lands bounded by the street or highway. The doctrine is equally applicable to the construction of a railroad by a private corporation, for the enterprise is considered a public one, and the authority is conferred for the public benefit. It is on this account that such corporations are authorized to exercise the right of eminent domain, which could not be conferred in respect to any other than a public undertaking. (*Bloodgood v. The M. & H. R. R. Co.*, 18 Wend., 9; *Davis v. The Mayor, &c., of N. Y.*, 4 Kern., 523.)

A number of cases are referred to in the opinion of the general term, as tending to establish the doctrine that the defendants are liable for all damages consequent upon the erection of their works, irrespective of the question of negligence or want of care and skill in constructing them. Considering the point to have been conclusively adjudged in the case of *Radcliff v. The Mayor, &c.*, I might leave the point to stand upon that precedent; but I think it may readily be shown that there

Bellinger v. The New York Central Railroad.

is no well-considered case having a contrary tendency. In *Boughton v. Case* (18 John., 405), the action was for interrupting the flow of the water along a turnpike road and the ditch belonging to it, so that it was turned into the plaintiff's garden and destroyed his vegetables. Defence, that the defendant was engaged in repairing the turnpike road under the authority of the company. There was a judgment for the plaintiff, which was sustained by the Supreme Court. The judges say that the question before the jury was, whether the bar across the road had been properly constructed, and whether the damage done to the plaintiff's garden might not, with reasonable care and diligence, have been avoided. They declared that it was a case in which the defendants could guard against the injurious consequences, and that it was their duty to do so. "If," they added, "they will not take this reasonable care, and the property of individuals is damaged by their unskillfulness or negligence, they are responsible." The case was one of small moment, and arose in a justice's court, and was not elaborately treated; but it does not aid the plaintiff, for it is clear that the ground of liability was considered to be that which I have stated.

The case of *The Rochester White Lead Company v. The City of Rochester* (8 Comst., 463), was an action for negligently constructing a culvert under one of the streets of the city, by means of which (on account of the deficient capacity of the passage-way for the water), its flow in a freshet was obstructed, and it was set back upon the plaintiff's manufactory, to his injury. A recovery by the plaintiff was sustained. The action, it will be perceived, sounded in negligence, and the opinion of the court proceeded wholly on the ground that the charge had been established; the main suggestion of the court being that the city had not shown that it employed a competent engineer to construct the culvert. No idea appears to have been entertained that the defendants were responsible for the mere fact of setting back the water, irrespective of the question of negligence. If that were the law, the whole discussion in the case would have been without an object. A late case in the Court of Queen's Bench has been insisted upon, as determining

Bellinger v. The New York Central Railroad.

the precise question against the present defendants. The declaration charged the defendants in that case with erecting an embankment across certain low lands in the valley of the river Dun, "without having or leaving sufficient arches or water-way to allow the flood waters to escape," whereby they were penned back and finally forced upon the plaintiff's land to his injury. The plaintiff had a verdict; and, on the argument of a rule to show cause, two questions were discussed and determined. The first was, whether the owner of the land, under whom the plaintiff claimed as lessee, had not been already compensated for these damages by the award of an arbitrator. The company had purchased a parcel of the land of this proprietor for the track of its road, the price of which was, by agreement, to be determined by an arbitrator, and the submission provided that he should, in addition to the compensation for the land, include all damages done to the remaining estate of the vendor, "occasioned by severance or otherwise, which could have been awarded by a jury, in case the value of such land and compensation for damages had been settled by the verdict of a jury." The arbitrator awarded a gross sum for the value of the land, including the damages mentioned, which was paid; and the defendant insisted that this embraced the damages for which the suit was brought. The court held otherwise, and decided that it only included the damages which were capable of being ascertained and estimated at the time compensation was awarded, and did not reach the damages in question, which, it was said, could neither be foreseen nor even guessed at by the arbitrator. The second question was, whether the defendants were liable, since they had built the road according to the provisions of the act of Parliament authorizing its construction. The act obliged the company to make openings for flood waters in one part of the route, in another county, but was silent as to such openings at the place in question. Hence the defendants insisted, upon the principle *expressio unius est exclusio alterius*, that they were not bound to make flood gates at that place. Upon that point, the court said, the company might have been at liberty, under the act, to con-

Bellinger v. The New York Central Railroad.

struct their railway across the lowlands in the manner they had done; but that it did not follow that, in case an unforeseen injury should arise to any one from the mode in which it was constructed, they are not liable to the action. They added that the company might, by proper caution, have avoided the injury which the plaintiff had sustained; "and we think," the opinion concludes, "*that the want of such caution was sufficient to sustain the action.*" (*Lawrence v. The Great Northern Railway Co.*, 16 Adol. & Ellis, N. S., 643.) The case does not, I think, afford any countenance to the idea that the defendants are liable at all events for an injury occasioned by their embankment. They are to use all reasonable caution; but, exercising such caution, they had a right to construct the road, and were not liable to any consequential damages to any one whose property they did not directly invade. The defendants in the case cited contended for impunity, though they had not used due caution, under the peculiar terms of their act. What the present plaintiff contends for is, that the utmost care and skill in constructing the works will not avail the defendants, if, after all, an injury has happened in consequence of the existence of the work, though they had the authority of an act of the legislature to construct it.

An obstruction may be such that any one, whether professional or not, would see at a glance that it was improper and lacked safeguards necessary to be made, and which might effectually prevent injury. Such seems to have been the case just mentioned. There was but a single culvert in the embankment, and the injury was done during a high flood occurring the same year in which the lands were appraised. In this case there was an opening of considerable width, besides the bridge over the creek, for the passage of floods. It does not appear that it had ever proved insufficient except when a high flood was complicated by the breaking up of the ice, and that occurred only thrice in twenty years, and the same thing appears to have happened once at least before the embankment was constructed; and, on one of the occasions after the building of the road, the freshet was destructive to most of the

Bellinger v. The New York Central Railroad.

bridges on the creek. In my opinion, the passage of the creek and valley by the railroad called for the exercise of engineering skill and judgment of a high order. The character of the creek and its habits (if that expression may be used) should have been investigated, and especially its liability to be broken up by a thaw in the winter, when covered with thick ice. It is possible that any embankment across the valley, even when furnished with the full amount of openings which could be left consistently with laying a rail track, would modify, to some extent, the action of the water upon the ice in the case of a winter flood. While I have been engaged in examining the case, the streams in the vicinity of this road have been opened by a spring flood, and the track has been covered for a considerable distance by ice and debris, so that the trains have been stopped for a considerable time. Whether it was practically possible to have fixed the grade so that this would not have happened, can only be determined by the judgment of men skilled in such matters. The defendants, as the judge at the trial very properly said, were not insurers. But they were authorized to build the railroad at the place where they did build it; and if, necessarily and in spite of all reasonable safeguards and precautions in constructing the work, occasional disturbance to adjoining lands would arise from a winter freshet, it was the misfortune of the plaintiff that he had lands exposed to such occurrences.

There are two other cases mentioned in the opinion of the general term, namely, *Fletcher v. The Auburn and Syracuse Railroad Company* (25 Wend., 462), and *Brown v. The Cayuga, &c., Railroad Company* (2 Kern., 486). The first of these cases is substantially overruled in the one referred to in 4 Comstock, 195. In the other case the only question presented was, whether a party continuing a nuisance was liable if he had not had notice to remove it. The concluding sentence in the last opinion given in that case, was written when the writer had not in his mind the case in which *Fletcher v. The Auburn Company* was reconsidered; but no part of that opinion was adopted by the court. The case itself raised no question material to the

The People v. Smith.

present inquiry; and it cannot therefore be considered a precedent in the case under consideration.

I am of opinion that the judgment should be reversed, on account of the erroneous ruling upon the question of evidence.

HOYT, J., dissented; COMSTOCK, Ch. J., and LOTT, J., did not sit in the case.

Judgment reversed, and new trial ordered.

THE PEOPLE, *ex rel.* PRICE, v. SMITH.

A member of the first division of the militia of this State, who removes outside of its bounds into a county adjacent, although not forfeiting by such removal any military office then held by him, ceases to be eligible to election to any new office.

The privileges reserved to him, notwithstanding his removal, are such as may be claimed of right; and not those, like promotion, which are dependent on the favor of others.

APPEAL from the Supreme Court. Action in the nature of *quo warranto* to oust the defendant from the office of colonel of the first regiment of the militia of this State. The trial was before Mr. Justice JAMES, a jury having been waived; and he found these facts:

The defendant, Spencer H. Smith, was formerly a resident of the city of New York, and continued to reside therein till some time in the month of April, 1857, when he removed to the county of Queens, in this State (a county adjacent), where he has ever since resided. In 1858 he was duly appointed and commissioned a staff officer of the first regiment in the first division of the New York State militia, and continued such officer up to March 17, 1859. On that day an election was held to fill a vacancy in the office of colonel in that regiment, at which he received twenty-one out of twenty-eight legal votes cast. He was thereupon declared to be duly elected, and

The People v. Smith.

received his commission: he entered upon the duties of that office, and was discharging the same when this action was commenced. At the time of such election, the county of New York and the county of Richmond comprised the first division district; the county of Richmond and the first, second, third, fourth, fifth, sixth, seventh and eighth wards of the city of New York the first brigade district; and the first and second wards of the city of New York the first regimental district.

The judge held that the defendant was ineligible, and his election void.

Judgment of ouster was accordingly entered, which having been affirmed at general term in the first district, the defendant appealed to this court. The cause was submitted on printed arguments.

Charles W. Sanford and Lucius Pitkin, for the appellant.

William F. Howe, for the respondent.

LORT, J. For the proper determination of the question, whether the defendant's election to the office of colonel is legal and valid, it is necessary to refer particularly to certain provisions of the general law providing for the enrollment of the militia and the organization of uniform corps and the discipline of the military forces of the State, passed April 17, 1854 (ch. 398); the act in relation to the first division and fifth brigade of the New York State militia, passed April 14, 1855 (ch. 536); and the act to improve the discipline and promote the efficiency of the military forces of this State, passed April 8, 1858 (ch. 129).

By the general law of 1854 (§ 1, tit. 9), the commander-in-chief was authorized to establish and prescribe such rules, regulations, forms and precedents as he should deem proper for the use and government of the military forces of this State, and to carry into full effect the provisions of that act. Such rules, regulations, forms and precedents were to be published in orders by the Adjutant-General, and from time to time dis-

tributed to the commissioned officers of the State. The commander-in-chief, in pursuance of the authority so conferred on him, established and prescribed certain rules and regulations, which, on the 6th of April, 1858, were promulgated and published by the Adjutant-General, in a general order of that date, and were subsequently, by the 14th section of said act of April 8, 1858, made "part of the acts for the government of the military forces." It is provided by section 693 of those rules and regulations, that, "to be eligible to election or appointment to office in the military forces of this State, the person must be a white male citizen of the United States, of the age of eighteen years or upwards, and a resident of the proper military district, city or village, agreeably to law;" and by the previous section (§ 692), it is declared that "the election or appointment of an ineligible person is entirely void, and he is not entitled to be commissioned." These provisions were in full force at the time of the defendant's election. It then becomes material to inquire whether he was "a resident of the proper military district, city or village, agreeably to law." By the general law (tit. 4, § 3), it was enacted that the division, brigade, regimental and company districts, as then organized, should continue to be and remain as the military districts of the State, subject, however, to such alterations or consolidations as the commander-in-chief should, from time to time, see fit to make; and, by section 20 of the same title, it is provided that "all commissioned officers, residing in any city or incorporated village in this State, shall be deemed to be within the bounds of their respective commands, providing any part of the military district to which they properly belong shall be located within such city or village." It is a conceded fact, in this case, that the first regimental district, at the time of the defendant's election to the office of colonel, comprised the first and second wards of the city of New York, and that he, at that time, was not a resident within either of those wards. Such non-residence, however, would not have made him ineligible if he had resided in any part of that city, inasmuch as that military district was located therein, and he would then have been a resi-

The People v. Smith.

dent of the proper military bounds or territory prescribed by section 693 of the regulations referred to. The residence required, as a compliance with that regulation, must be either within a military district as specifically defined and designated, for which an election is to be held, or within a city or village in which the district, or a part thereof, is situated, although such residence is not within the territorial bounds of the district itself. This construction is in harmony with, and gives effect to, the provision of section 20 above cited, to which, in my opinion, reference was had in framing and prescribing that regulation. The defendant, however, was not a resident of the city of New York, and, consequently, was not eligible to the office to which he was chosen, unless the provisions to which I shall now refer have made him so. It is provided by those regulations (§ 702), that "commissioned officers will be considered as having removed out of the bounds of their commands and vacated their offices (unless otherwise provided by law), under the following circumstances, viz.: major-generals and their staffs, on removing beyond the bounds of their respective divisions; brigadier-generals and their staffs, on removing beyond the bounds of their brigades; field-officers and regimental staff, on removing beyond the bounds of their regiment; company officers, on removing beyond the bounds of their company, except when the company is made up from the different districts, and then, upon removing from the regimental district;" and it is declared, by section 65 of the act in relation to the first division and fifth brigade of the New York State militia, passed April 14, 1855, before referred to, that "any officer, non-commissioned officer, musician, or uniformed private, who may change his residence, from within the bounds of said division into any adjacent county, or from within any county adjacent into the said division district, shall not thereby vacate his office or post; but he shall be held to duty in the division, brigade, regiment, troop, or company to which he was attached at the time of such change of residence, and he shall be subject to duty therein, and shall be entitled to all privileges, immunities and exemptions allowed by law, and shall be

liable to fines and penalties and the collection of them in the same manner as if such change of residence had not taken place." It is claimed by the defendant that the effect of these provisions, when a commissioned officer in that division removes into an adjacent county, is, not only that he retains his office or post, but also that he is not considered as having removed out of the bounds of his command. That position cannot be maintained. It is true that an officer, by such change of residence, does not vacate his office or post, but, on the contrary, he is held to duty, and is entitled to all the privileges, immunities and exemptions allowed by law, in the same manner as if such change of residence had not taken place. Such is the evident meaning of section 65; but no color is thereby given for the construction that he is still to be considered as resident within the bounds of his command. It was doubtless understood, when that section was enacted, that changes to and from the bounds of the first division district and the counties adjacent thereto were frequent, and it was apparent that such changes, if permitted to produce a vacancy and an exemption from duty in the military body from which the removal was made, would seriously impair its efficiency. That result was, therefore, avoided by declaring that such change did not relieve from the duty which the office or post then held enjoined, nor take away the privileges, immunities and exemptions which the performance of such duty conferred. The provision, however, related only to the duty or post then held, and the privileges, immunities and exemptions then allowed by law. While, therefore, the removal of the defendant did not forfeit or vacate his office of staff officer, he did not, by the reservation of the right to hold it and the privileges appertaining thereto, also acquire the right of an election or appointment to another office, or any new right; and he could not be held to duty in any other office or post than that then held by him. It has been suggested that one of the privileges reserved was the privilege of promotion. That, in my opinion, is a misapplication of the term. The privileges to which the party is entitled are stated to be those "allowed by law:" they are such as

The People v. Smith.

can be claimed of right, and are not dependent on the favor or will of others. Many privileges, immunities and exemptions are given and granted to the members of the first division, by the provisions of the law under which it was organized. It is to such that a person, who continues to serve after a change of residence, shall be entitled, and to such only. This is the fair and ordinary meaning of the language used; and that it was intended to be so understood is apparent from the provisions of section 86 of the same act, which provides that the fifth brigade district of the militia of this State "shall possess all the privileges and exemptions, and be subject to all the duties and service, granted and imposed to and upon the first military division;" showing that privileges and exemptions previously specified were contemplated.

The preceding views lead us to the conclusion that the defendant was, after his removal to Queens county, ineligible to the office of colonel to which he was chosen.

The judgment of the Supreme Court must, therefore, be affirmed.

COMSTOCK, Ch. J., DAVIES, JAMES, and HOYT, Js., concurred.

SELDEN, J. (Dissenting.) To arrive at a just conclusion in this case, it is necessary to collate several statutory provisions and military regulations, and to ascertain their combined effect. The commander-in-chief of the military forces of the State having been authorized by the act passed April 17, 1854, to establish rules, regulations, forms, &c., for the use and government of those forces, and having, pursuant to this authority, prescribed a body of rules for that purpose, these rules are, by section 14 of the act of April 8, 1858, made a part of the military laws of the State. Section 693 of these rules provides as follows: "To be eligible to election or appointment to office in the military forces of the State, the person must be a white male citizen of the United States, of the age of eighteen years or upwards, and a resident of the proper military district, city or village, *agreeably to law.*"

The People v. Smith.

Were it not for the last words of this section, the inference from its provisions might be that it was designed to exclude from eligibility all persons not residing within the district in which the particular military corps in which the election occurs is located; in other words, to require that, to be eligible to a company office, they must reside within the limits of the company, or, to a regimental office, within the limits of the regiment, &c. But the words, "agreeably to law," imply the existence of other legal provisions on the subject, and refer the question of eligibility entirely to these provisions. It becomes necessary, therefore, to see what other statutory provisions there are, bearing upon the question.

Upon the 14th of April, 1855, an act was passed in relation to the first division and fifth brigade of the New York State militia. Section 65 of this act is in these words: "Any officer, non-commissioned officer, musician, or uniformed private, who may change his residence, within the bounds of said division, into any adjacent county, or from within any county adjacent into the said division district, shall not thereby vacate his office or post, but he *shall be held to duty* in the division, brigade, regiment, troop or company to which he was attached at the time of such change of residence, and *he shall be subject to duty* therein, and shall be entitled to all privileges, immunities and exemptions allowed by law, and shall be liable to fines and penalties, and the collection of them, in the same manner as if such change of residence had not taken place; and process for the collection of such fines and penalties may be executed in either New York or any adjacent county."

Section 693 of the military rules is made, by its terms, entirely subordinate to this statutory provision; and, as there does not appear to be any subsequent statute conflicting in this respect with the act of 1855, the whole question turns upon the interpretation to be given to section 65 of the latter act. By the construction put upon this section by the learned judge before whom the cause was tried, while an officer of a regiment in the city of New York, by removing from the city into an adjoining county, does not forfeit his office he, nevertheless,

The People v. Smith.

thereby renders himself ineligible to any other office in that regiment, or, unless the removal is to the county of Richmond, in the division to which such regiment belongs.

I find it somewhat difficult to reconcile this construction with the terms of the provision, or with what appears to have been its object. It secures, in express terms, to persons so removing, all the privileges which appertain to them as members of the corps to which they belong at the time of their removal. Eligibility to office is a privilege, and, among military men, is apt to be considered as not the least among the many privileges they enjoy. If military men in the city of New York, by removing into the suburbs of the city, within the limits of an adjoining county, thereby render themselves incapable of promotion, while, at the same time, they are compelled still to do duty in the city, they would be deprived of a privilege which, undoubtedly, many of them consider valuable.

One object of the provision in section 65, confined, as it is, to the first division of the militia of the State, seems to me to have been, to meet the exigencies of those who are engaged in business in the city of New York, but who, nevertheless, have their residences without the bounds of the city, in some one of the adjoining counties. Whether the defendant in this case belongs to this class or not, is immaterial. The construction put upon the section would necessarily include them all.

The words, "shall not thereby vacate his office or post," are not the only operative words of the section; nor is it to be inferred that they embrace its sole, or even its principal object. It provides that the person removing "shall be held to duty" in the corps to which he belongs; and, again, that he "shall be subject to duty therein." Its object, very plainly, was not merely to confer a favor upon officers by saving to them their offices. It applies to privates as well as officers, and compels all alike to continue to do duty in the corps to which they are attached; subjecting them to the same fines and penalties as if they had not removed. As, therefore, it imposes all the burdens existing before the removal, is it not fair to infer

Bissell v. The New York Central R. R. Company.

that it intended to preserve all the corresponding privileges, especially when this is the import of its language?

If the statute operated upon officers alone, there would be more plausibility in saying that it was simply intended to prevent a forfeiture of their offices; although there would be very little propriety, even then, in compelling a man to serve in a subordinate office, and, at the same time, depriving him of all power of obtaining advancement. But there would be still greater injustice in obliging privates to continue to do duty in a corps in which they can have no hope of promotion. The design of the statute must, I think, have been, in part, to prevent changes in the ranks of the various military corps of the city, by removals from the city simply into the adjoining counties, or from those counties to the city, and to preserve to the individuals so removing their military *status*, whatever it may be, with its privileges as well as its duties alike undiminished.

It follows from these views that so much of the judgment of the Supreme Court as adjudges that the defendant Smith has usurped and unlawfully held and exercised the office in question, is erroneous and should be reversed.

DENIO, J., concurred in this opinion; MASON, J., expressed no opinion.

Judgment affirmed.

BISSELL et al. v. THE NEW YORK CENTRAL RAILROAD COMPANY.

As between grantor and grantee the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. There is no distinction, in this respect, between the streets of a city and country highways.

So held, where the conveyance contained no reference to the street, by name, but the lot was described by its number, "according to an allotment and survey made by E. J.," upon whose map the lot was repre-

23	61
118	219
118	220
118	222
38	61
122	114

23	61
128	259

23	61
131	298

23	61
135	345

23	61
137	322
138	191

23	61
141	301

23	61
168	*614

23	61
77	AD*490

Bissell v. The New York Central R. R. Company.

sented as abutting upon a street, and the depth of the lot was stated by figures which would not include any part of the street.

The grantor held to have dedicated such street as between him and his grantees, although his map represented it as continuing through the land of an adjoining proprietor, which closed it against any highway in one direction, and such adjoining proprietor, never, in any manner assented to the continuation of the proposed street, nor was any part of the street adopted as such by the public authorities.

The grantee of all the lots on both sides of the street thus designated, held entitled to the exclusive possession of the proposed street against ejection by the grantor.

APPEAL from the Supreme Court. Action to recover the possession of land in the city of Rochester. The plaintiffs claimed title under William W. Mumford. Upon the trial it was proved that, in 1825, Mumford was the owner of one half of a block of land in the city of Rochester, including the premises in controversy, which tract was surrounded on all sides by streets opened and used as public highways. He caused his portion of the block to be surveyed and subdivided into lots, and a map to be made representing such lots as abutting upon a street extending from Kent street, one of the boundaries of his tract, through the centre thereof, and also through the land of adjoining proprietors, to Jones street. This proposed avenue was designated on the map as Erie street, and that part of it within Mumford's allotment was the land in controversy in this action. Mumford proceeded to sell, and did sell, all of his lots, by deeds, describing them according to their number upon his map, in this manner: "Lot No. 1, section G, according to allotment and survey of part of Frankfort [a portion of Rochester including Mumford's tract], made by Elisha Johnson; said subdivision being 33 feet front and rear and 70 feet deep." but without any mention of or reference to said street by name. Mumford's grantees entered upon such lots and built thereon, and the strip denominated as a street was used by them for access to their lots, and was opened so far as Mumford's land extended; but was not opened through the other half of the block to Jones street. It did not appear that the owner of the other half of such block plotted his

Blissell v. The New York Central R. R. Company.

ground into city lots, or in any way assented to the opening of a street through the same; and a fence was kept up by him between his portion of such block and that of Mumford. The defendant acquired all the rights of the several grantees of lots from Mumford, and was in occupation of the same and of the land between, designated as Erie street, which it had covered with a warehouse and other structures. The judge, under exception by the defendant, directed the jury to find a verdict for the plaintiffs. The judgment entered thereon was affirmed at general term in the seventh district, and the defendant appealed to this court.

Henry R. Selden, for the appellant.

Theron R. Strong, for the respondents.

MASON, J. The question presented for adjudication in this case is, whether the several deeds of conveyance executed by William W. Mumford, between the years 1828 and 1845, to different individuals, conveying lots on either side of Erie street, in the city of Rochester, carried the lands to the centre of that street. These deeds describe the lots invariably by their numbers; "*reference being had to the allotment and survey made by Elisha Johnson.*" In some cases the size of the lot is given: "being 33 feet front and rear, and 99 feet deep." There is no express mention of any street in any of the deeds. It appears that, before selling any of the lots, Mr. Mumford, the original proprietor of these lands, placed his map, or a copy of it, in the hands of agents engaged in selling his lots, and that they made sales in reference to the map. On this map the lands in controversy are laid down as "*Erie street,*" and these lots conveyed lie both on the north and south sides of "*Erie street.*" The simple question, then, is, whether a conveyance of a lot bounded on a piece of ground thus laid out upon the map as a street, and called a street, but which is not, in fact, a public street or highway, carries the grantees to the middle of the street. The question, so far as it

Bissell v. The New York Central R. R. Company.

is here presented, involves merely the construction to be given to these deeds. The inquiry is as to the extent of the grant.

If the rule of construction in regard to such grants is not to be considered as settled in this State, I am inclined to hold that the inference of law is, that such a conveyance carries with it the fee to the centre of the street, as part and parcel of the grant. There is no more reason, it seems to me, to infer an intention in the grantor to withhold his interest in or title to the land covered by the street, after parting with all his right and title to the adjoining land, than there is in the case of a deed bounded by a public highway.

I have not been able to discover any reason which can be given in the one case, which is not equally applicable to the other. The rule of construction is well settled in regard to a deed bounded by a public highway. The established inference of law is, that a conveyance of land bounded on a public highway carries with it the fee to the centre of the road as part and parcel of the grant. (2 J. R., 363; 15 id., 452; 1 Cow., 240; 3 Kent's Com., 433, 8d ed.) The rule seems to be based upon the supposed intention of the parties, and, it seems to me, upon a very reasonable intention. The idea of an intention in a grantor to withhold his interest in a highway to the middle of the street, after parting with all his right and title to the adjoining land, ought never to be presumed; and all the cases hold that, in such a case, it requires some declaration of such an intention in the deed to sustain such an inference. There is no reason for presuming a different intention in a case like the present. The grantor, Mumford, intended this as a street, and gave it the name of Erie street, and, as regards his grantees in these deeds, he dedicated it as a street, according to all the cases, whether the public ever accepted it as such or not. It was, as between him and his grantees, a street which they had a right to use as such, as soon as these conveyances were made by him. (1 Wend., 262, 427; 2 id., 472; 8 id., 85; 11 id., 486; 17 id., 650; 18 id., 411; 19 id., 128; 1 Hill, 189.) As regards the public generally, I admit it does not become a public highway until there has been an acceptance, either by for-

mal act of the public authorities, or by common user under such circumstances as show an intent to accept it. (*Holdane v. The Trustees of the Village of Cold Spring*, 21 N. Y., 474.) This does not, in any manner, as I can perceive, affect the matter as between this grantor and his grantees. As between them and him, his conveyances, *per se*, dedicated it to their use as a street. I do not see, then, how, as regards these grantees, Mumford can be allowed to say it is not a street.

This being so, the rule of construction which should be applied to his conveyances is the same as if it were a public street, as regards the public generally. If, as regards these grantees, it is a street, and if, in his conveyances, he intended it as a street, as all the cases hold he did, I am not able to see why the legal inference, as regards his conveyance, is not the same as if it were a public highway. There is no more reason to presume the intention in the grantor in such a case to withhold his interest in the road to the centre of it, after conveying all his right and title to the adjoining lands, than there would be were this to all intents and purposes a public street. The question in each case becomes one of presumed intention arising upon the conveyance itself; and I am not able to perceive how it is possible to deduce a different intention in one case from that which, the law has settled, shall be inferred in the other. Did not Mumford, when he caused these lots to be laid out on either side of this street, and this street designated, named, and put down on the map, and these lots numbered, and when he conveyed these lots to purchasers with a reference to this allotment and survey, intend that this should be a street, by the name of Erie street? No one will pretend that he did not. Did he not, by selling these lots to purchasers with reference to this map and street, and conveying the lots to them on both sides of the street, thereby, so far as these grantees are concerned, dedicate this as a street? No one can claim to the contrary. All the cases affirm it. Did he not, then, in making these conveyances to these purchasers, intend to convey lands upon a street, so far as the grantees in these deeds are concerned, and did not these purchasers so under-

Bissell v. The New York Central R. R. Company.

stand it? No one can doubt it for a moment. If such was the intention of the parties to these conveyances, then I am not able to perceive why the conveyance does not carry with it the usual legal inference that a conveyance bounded by a highway does, to wit, that it carries with it the fee to the centre of the road.

I certainly am not able to discover any more intention in the grantor to withhold, in these conveyances, his interest in the land covered by this street, than would be if the public authority had already laid out the street, and the grantor still held the fee subject to the easement. As between these parties, grantor and grantees, it is a public street to all intents and purposes, except that the public authorities are not bound to keep it in repair. It is made such by Mumford himself, in laying out the street and putting it upon his map, and selling these lots upon either side of it with reference to the map and street; and he has probably received the full value of the street in the increased price of the lots sold upon the street. (1 Hill, 190; 1 Sandf., 323, 346, 347; 17 Mass., 415; 4 Cush., 332; 8 Wend., 99; 17 id., 661; 6 Pet. U. S., 438.) If the views above expressed are correct, it follows that we must hold that these conveyances by Mumford carried the fee to his grantees to the centre of this street, unless this court shall feel constrained, in deference to the authority of the New York city street cases, to come to a different conclusion.

I have looked carefully into these cases, of which there are ten in number, and may be found in our reports, as follows: 4 Cow., 542; 1 Wend., 262; 2 id., 472; 8 id., 85; 11 id., 486; 17 id., 650; 18 id., 411; 19 id., 128; and 1 Hill, 189.

It cannot be denied that these cases seem to assume that a different construction should be put upon such conveyances in city lots bounded by a projected street. It is proper to remark, however, in regard to these cases, that they all arose on applications to the Supreme Court to set aside, or to confirm, assessments of damages on opening streets; and the question as between grantor and grantees does not seem to have been much considered. The discussion seems principally to have gone

upon the question whether the city should pay the full value of the lands on the ground that there was no dedication, or whether they should pay merely a nominal sum on the ground that there was a dedication of the street; and the court sustained the latter view.

Three of these cases were removed by writ of error to the Court for the Correction of Errors. In the first of those cases (*Livingston v. The Mayor of New York*, 8 Wend., 85), the Supreme Court had only awarded nominal damages to Livingston, and he having brought error, the court affirmed the judgment of the Supreme Court. As the corporation had acquiesced in the judgment of the Supreme Court, the question whether Livingston, having parted with his title, was not entitled to any damages, was not before the court; and this case, therefore, so far as the court of dernier resort is concerned, decides nothing as regards the question of title between grantor and grantee.

In the second case (*Wyman v. The Mayor, &c., of New York*, 11 Wend., 486), the case came before the Court for the Correction of Errors precisely in the same manner, and the same question, and no other, was presented to that court; and the only question was, whether the grantor was entitled to more than nominal damages, and not whether he was entitled to that, for the city had acquiesced in the judgment of the Supreme Court, and they could not say, therefore, that the judgment for nominal damages should be reversed.

In the third case, which was that of *Champlin v. Laytin* (18 Wend., 411), the question under consideration was in no respect adjudicated by the Court of Errors; and all that was decided in that case is perfectly consistent with the view that the grantee in such cases takes to the centre of the street.

There is another consideration which should be taken into account in considering whether these cases are to be regarded as controlling authority upon the question before us, and that is, the grantee was not a party to the proceedings, and did not have his day in court to contest the issue; and, besides, those cases were not adjudged in a plenary suit or action

Bissell v. The New York Central R. R. Company.

at law. The cases came before the court in a summary way, upon application to confirm, or set aside, the assessments, and ought not to be regarded as so high evidence of the law as judgments of the court pronounced after a full trial in an action according to the course of the common law. There is another, to my mind, very objectionable feature to these street cases, that is, they seem to have inculcated the idea that there was a different rule of construction to be applied in such cases to a deed of land in a city from what there is to such a deed in the country. Such a doctrine I affirm has no foundation in principle, and will not, I apprehend, find any favor with this court. These cases were most severely criticised by the distinguished counsel who argued for the defendant in *Hammond v. McLachlan* (1 Sandf., 323); and the Superior Court held these cases were not controlling authorities in that court upon the question under consideration. The same was again held in *Herring v. Fisher* (1 Sandf., 344), and in the case of *Stiles v. Curtis* (4 Day, 328), the Supreme Court of Connecticut held, in a precisely similar case to this, that the conveyance carried the fee to the centre of the street. It seems to me, in view of these considerations, that this court cannot be considered as constrained by anything said in these New York street cases from fully considering the question presented, upon its merits, and deciding it according to the real intent of the parties; and it seems to me that, for the reasons above, as well as for the reasons stated by Judge OAKLEY in *Hammond v. McLachlan*, that the judgment of the Supreme Court should be reversed and a new trial granted.

DENIO, DAVIES, JAMES, and HOYT, Js., concurred; SELDEN, J., expressed no opinion; COMSTOCK, Ch. J., and LOTT, J., did not sit in the case.

Judgment reversed, and new trial ordered.

Phelps' Executor v. Pond.

DODGE, Executor of Phelps, v. POND *et al.*

Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative.

A testator, without violating any law, may not only suspend the absolute ownership of his estate during the continuance of any two lives in being at his death, but may dispose of the income annually as it accrues during this period of suspension. He may also give vested legacies, and provide for their payment at future definite periods. It is no violation, therefore, of the statute against accumulations, for a testator, after rendering his estate inalienable for two lives, to give pecuniary legacies, payable at future periods, in such manner as to show that he intended they should be paid exclusively from income as it should accrue, leaving the corpus of the estate to pass unimpaired to the residuary legatees.

If, in such a case, the legacies are so adjusted as to warrant the inference that the testator intended an accumulation of income, although this implied direction to accumulate is void, yet no provision of the will which can be executed independently of it is thereby affected, but it is the duty of the executors to distribute the surplus of income accruing in any year among the persons entitled thereto.

The statute (1 R. S., § 40) giving, to the persons presumptively entitled to the next eventual estate, income accruing during a suspension of the absolute ownership, and of which no disposition or valid accumulation is directed, is applicable in respect to the income of personalty only where such income is derived from some specific fund, or is distinguishable from that of all other property.

Accordingly where, as in this case, no interest was given to the residuary legatees in that portion of the estate devoted to the payment of specific legacies, and the latter are payable out of both income and principal, the surplus accruing in any year belongs not to the residuary legatees, but to the next of kin.

The executors held to have no power to anticipate the payment of legacies on a rebate of interest during the period in which, according to the testators' intention, the legacies are to be paid from income.

A bequest to executors, of \$50,000, to be applied by them to the erection of a college in Liberia if \$100,000 should be raised for that purpose in this country is void, as depending upon a contingency which may never happen, without any limitation of the period of suspension.

23	69
113	359
23	69
131	58
23	69
140	536
23	69
160	288
23	69
163	197

Phelps' Executor v. Pond.

Such bequest is, it seems, also void for indefiniteness as to the object, and because, after the application of the money by the executors, no provision is made as to the ownership of the property into which it may be converted, or for the substitution of competent trustees in place of the executors.

An instrument, executed by the testator in his lifetime, declaring his purpose to place \$100,000 in the hands of his son for charitable purposes, which concludes, "in accordance with the inclosed proposition, I herewith inclose my promissory note, viz.: I, for value received, hereby promise to pay \$100,000," &c., &c., held void as without consideration. The doctrine by which such promises have been sustained when made for the direct benefit of a child, has no application where the child, though the promisee, is not the beneficiary of the promise.

The will directed the investment of a fund to raise an annuity of \$5,000 for his widow during her life. In case of her death before a division of his residuary estate, which was to take place upon the death of two other persons, or at the expiration of ten years, such fund should fall into the residuum. If she should survive the period thus limited, then the fund provided for her annuity, to go to the testator's children and grandchildren: *Held*, that the disposition in both its alternatives is void for illegal suspension of ownership, as suspending the distribution, either for three lives, in fact, or for the definite period of ten years.

APPEAL from the Supreme Court. Action by William E. Dodge, surviving executor, for a construction of the will of Anson G. Phelps, who died November 30, 1853, leaving a will, executed March 26, 1852. He left surviving a widow, one son, four married daughters, and three grandchildren by a deceased daughter, Mrs. James. At the time of the testator's death, he had living nineteen other grandchildren. Another grandchild was found upon the evidence to have been *in esse* at the time of the testator's death, and was born in June following. The testator's property, exclusive of a house in the city of New York specifically devised to his widow, amounted to \$999,867.19 in personalty, aside from doubtful demands and real estate valued at \$1,059,650, but producing an annual income of only \$34,000. He owed debts to the amount of \$46,897.52, in addition to mortgages on his real-estate amounting to \$254,098. He gave to his widow, in fee, his dwelling-house in the city of New York, and all his household goods, furniture, plate, carriages, &c., and an annuity of

Phelps' Executor v. Pond.

\$5,000 for life, to raise which he directed his executors to invest a sufficient sum in such securities as they should judge proper, and to keep the same as a separate fund. This provision was expressed to be in lieu of all dower and thirds out of his estate. The widow died intestate, before the hearing in this court. The son was also dead. The first clause of the will authorized and empowered the executors to sell and convert into money all the testator's estate, real and personal (except that given to his wife), either at public or private sale, and upon such terms as they might think conducive to the interests of his estate. With this exception, the will gave no direction as to the management of the property, the investment or accumulation of its income during the interval between his death and the vesting of the contingent interests, or the payment of the legacies under the final disposition in the residuary clause hereinafter set forth.

The fourth clause was that which provided for the widow's annuity, as above stated.

The fifth and sixth clauses of the will gave legacies of \$1,000 each to two of the testator's nieces, the one payable presently, the other in ten annual installments. By the seventh clause he gave to each grandchild, living at the time of his death, the sum of \$10,000, to be paid to them as they should severally attain the age of twenty-one years. The eighth clause gave to each of said grandchildren, payable at the same time, the further sum of \$5,000, with an injunction that each should regard it as a deposit, the income of which he desired them to expend in promoting the spread of the Gospel, and the principal to be transmitted unimpaired to their respective descendants, to be devoted to the same object. No question was raised in respect to either of the provisions thus far mentioned.

The ninth and twentieth clauses of the will contain testamentary dispositions which, in connection with its general intent, were claimed to be invalid. They are as follows:

"*Ninth.* I give and bequeath unto each of my children, who shall be living at the end of ten years after my decease, the sum of one hundred thousand dollars, provided my son Anson

Phelps' Executor v. Pond.

G., or my son-in-law William E. Dodge, shall either of them then be living; but in case they both shall die before that time, then I give one hundred thousand dollars to each of my children who shall be living at the decease of the survivor of them."

"*Twentieth.* After paying and satisfying, or providing for the payment of, all the legacies and bequests hereinabove mentioned in full, then as to all the rest, residue, and remainder of my estate, whatsoever and wheresoever the same may be, I give, devise, and bequeath the same to my children and grandchildren, as follows: I order and direct the same to be divided into as many shares as I shall have children and grandchildren living at the end of ten years after my decease, provided that my son Anson G. Phelps, or my son-in-law William E. Dodge, shall either of them be living at that time. But if, before the expiration of ten years from my death, my son Anson G. Phelps and my son-in-law William E. Dodge shall both happen to die, then, at the decease of the survivor of them, I order and direct my said residuary estate to be divided into as many shares as I shall have children and grandchildren living at the time of the decease of such survivor; it being my intention that each child and grandchild shall be placed upon an equal footing as to the said residue, and each child and grandchild receive one equal share of my residuary estate, upon such division as aforesaid, as soon thereafter as can conveniently be done."

The intermediate clauses gave legacies, amounting in the whole to \$371,000, to sundry religious and charitable corporations, all unconditional except one of \$50,000 for the benefit of a possible college in Africa.

It was claimed that the mode of payment provided for was evidence that the testator intended an illegal accumulation of the income of his personal estate. The several clauses gave the sums hereinafter mentioned to the respective beneficiaries in the following manner, viz.: The tenth, \$100,000 to the American Bible Society, in ten annual installments, the first payment to be made three years after the testator's death; the

Phelps' Executor v. Pond.

eleventh, \$100,000 to the American Board of Commissioners for Foreign Missions, in ten equal annual installments, to commence five years after the testator's decease; the twelfth, \$100,000 to the American Home Missionary Society, in ten equal annual installments, to commence seven years after the testator's death; the thirteenth, \$5,000 to the Union Theological Seminary in the city of New York, payable in ten annual installments; the fourteenth, \$3,000 to the Theological Seminary at Auburn, in three annual installments; the fifteenth, \$5,000 to the New York Institution for the Blind; the sixteenth, \$1,000 to the Half-Orphan Asylum, and the same sum to the Colored Orphan Asylum, in the city of New York, each payable in ten equal annual installments.

The seventeenth recited that it had been in contemplation to establish a college in Liberia, Africa, and some incipient steps, for that purpose, had been taken in Boston, and it provided that, if the enterprise should proceed, and \$100,000 should be raised for that purpose in this country, "then, and in such case, I give to my executors the sum of fifty thousand dollars, to be applied by them in such way as shall, in their judgment, best effect the object," wishing his executors especially to have in view the establishment of a theological department in such college.

The eighteenth clause gave to the executors \$1,000 in trust, to pay over the same to the persons who, at his decease, should be deacons of the Congregational Church in Simsbury, Connecticut, his native place, in the district of Hop Meadow, for the benefit of the poor of the town. The nineteenth, \$5,000 to his executors in trust, to pay over \$500 in one year after the testator's decease to the New York State Colonization Society, and the like sum annually thereafter till the whole should be paid.

The twenty-first clause provided that, in case the testator's wife should die before a division of the residuary estate should take place according to the twentieth clause (*ante*), the fund reserved by the executors to raise her annuity should fall into the bulk of his estate and form a part of such residue; but in

Phelps' Executor v. Pond.

case she should survive that period, the fund invested to secure such annuity should at her decease be divided into as many shares as the testator should have children and grandchildren living at the widow's decease, and each such child and grandchild receive an equal share.

On the 25th November, 1853, a few days before the testator's death, he executed a paper, bearing date on that day, which he handed to his wife, requesting her to deliver it to their son, which she did the next morning. This paper was addressed to Anson G. Phelps, Jr., and declared: "I have long had a desire to place something in your hands to be used prudently after my decease. I herewith inclose you my note for \$100,000 [describing it], to be used by expending the interest annually, but reserving the principal, the interest of which shall be devoted wholly to the spreading of the everlasting Gospel, to be retained in my son's hands until near the close of his life, then to be well invested by him or his executors, one-half of the principal for the benefit of the American Bible Society, the other half for the benefit of the American Board of Commissioners for Foreign Missions. In accordance with the inclosed proposition, I herewith inclose my note, viz., dated January 1, 1854, I, for value received, hereby promise to pay to Anson G. Phelps, Junior, or order, \$100,000. (Signed) Anson G. Phelps." The introductory portion of the paper mentioned this note as one which he intended should be payable five years after the date.

At general term in the first district, the Supreme Court decided:

That by the will the real estate was equitably converted into money in the hands of the executors, in trust for the purposes of the will;

That all the dispositions to religious and charitable uses were valid, except the seventeenth clause of the will;

That the promissory note of the testator to his son was void;

That upon the widow's death, before the period named in the residuary clause of the will, the ultimate disposition of her

Phelps' Executor v. Pond.

fund by the twenty-first clause was invalid, and such fund went for distribution as in case of intestacy, but in case of her death after the period named then the ultimate disposition of her fund is valid ;

That the ninth and twentieth clauses of the will were valid ;

That the executors were not authorized to accumulate any part of the interest or income of the testator's estate for the benefit of those to take under the twentieth clause ;

That the executors cannot anticipate the payment of the legacies payable at postponed periods, by rebate of interest or otherwise ;

That the mortgages on the real estate may be paid out of any funds in the hands of the executors, including the rents, issues and profits, and the proceeds of sales of the real estate of the testator ;

That the real and personal estate of the testator, including all income thereof, are applicable to the payment of the debts of the testator, to provide the widow's fund, and to pay the valid legacies ; but that the income is to be first applied to these purposes, and to payment of mortgages, taxes, &c., and the expenses of administration ; that after these appropriations, the whole residue is to be divided by the executors into as many shares as there shall be children and grandchildren living at the period fixed in the twentieth clause of the will, and the shares paid over to such children and grandchildren ;

That the widow's election to take the provisions of the will in her favor, does not preclude her from sharing under the statute of distributions in any personal estate of the testator not validly disposed of by the will.

Appeals were taken from this judgment, or from different portions of it, by several of the parties. The cause was argued here by

John K. Porter, William M. Everts and William Allen Butler,
for certain of the appellants, who contested the validity of the entire will.

Phelps' Executor v. Pond.

William Tracy, in support of the legacy for the prospective college in Liberia.

Marshall S. Bidwell, for the executors of *Anson G. Phelps, Jr.*, in respect to the note for \$100,000, and for the American Bible Society.

Daniel Lord, for the executor, and in support of the judgment, except so far as it prohibited the executor from anticipating the payment of legacies.

E. J. Phelps, for Mrs. Stokes (one of the testator's daughters), and her children, respondents.

SELDEN, J., delivered the opinion of the court:

It is, perhaps, not very important, so far as the questions argued at the hearing are concerned, to determine whether the power of sale conferred upon the executors by the first clause of the will in question is to be regarded as imperative, or merely discretionary, or whether we treat the property as remaining partly real and partly personal, as at the death of the testator, or as all converted into personalty. If, however, it is deemed to have any bearing upon the questions presented, there can, I think, be no doubt, from the terms of the power and the general provisions of the will, that the testator intended that the whole real estate, except that portion devised to the widow, should be sold and converted into money, prior to the general distribution provided for in the twentieth clause of the will, and that, upon the established principles of equitable conversion, this should be considered as done.

As, by the provisions of the will, the testator disposed of his whole estate, leaving nothing whatever to be distributed, as in cases of intestacy, provided the will is executed according to its terms, the only questions presented relate to the validity of the various dispositions made by the will. The principal objection to these dispositions is based upon the statute prohibiting accumulations of income, except for certain purposes.

But, before considering this main objection, let us first dispose of several others of minor importance which are presented in the case. The numerous dispositions to religious and charitable uses are, for the most part, conceded to be valid, unless the entire will is subverted in consequence of its scheme of accumulation. The only specific objection of any weight to this class of legacies is that made to the bequest, in the seventeenth clause of the will, of \$50,000 to the executors for the establishment of a college in Liberia.

It is doubtful whether the object to which this fund is to be devoted, as described in the will, is sufficiently definite to support the bequest, even if there were no other objection to its validity. The peculiar doctrines of the English Court of Chancery, in respect to charitable uses, having never been adopted in this State, trusts for such purposes cannot be sustained, unless the object of the trust is defined with clearness and precision. There is, perhaps, a difficulty also as to the title to this fund after the college should be established. The trust to the executors is simply to apply the money for the purpose indicated in such way as their judgment shall dictate. No provision is made for the ownership of the property into which the fund may be converted. It does not seem to be contemplated that the title of the executors should continue after the application of the money; and yet no provision is made for its transfer, and no trustees are substituted. It is essential to the creation of every trust, that a competent trustee be appointed to receive the title and execute the trust.

It is unnecessary, however, to pass upon either of these questions, as there is another objection to this legacy which is entirely fatal to its validity. It is not only made to depend upon a contingency, but a contingency which may never happen; and yet there is no limitation whatever to the period of suspense. If the legacy is valid, the executors would be bound to provide a fund for its payment, and the absolute ownership of this fund would, of course, be suspended in the meantime, as the legacy could not become vested until the happening of the contingency. Such a legacy is in direct contravention

Phelps' Executor v. Pond.

of the statute against perpetuities. A provision limiting the period for raising the \$50,000 to the continuance of two lives in being at the death of the testator, would have obviated this objection; but, as no such provision was inserted, the legacy is clearly void, irrespective of the other objections which have been suggested.

An exception was taken to that part of the judgment of the Supreme Court in which it was held that the paper purporting to be a promissory note for the sum of \$100,000, dated November 25, 1853, and payable, by the terms of the accompanying writing, to Anson G. Phelps, Jr., or order, five years after date, was void; and we have been favored with a very elaborate and ingenious argument to prove its validity. It is impossible, however, to obviate the objection that the promise was wholly without consideration. The note cannot be separated from the writing which accompanied it, and of which, indeed, it formed a part; and, although it contains the words, "for value received," yet the inference from these words is effectually repelled by other parts of the same instrument. The argument, therefore, drawn from the use of these words, is without weight. The promise was clearly a *nudum pactum*, and there is no theory upon which it can be legally sustained. A design to make a gift for benevolent or charitable purposes must be executed, or it is ineffectual. A mere promise to make a future gift, whatever may be its object, or the circumstances under which it is made, is void. (*Harris v. Clark*, 3 Comst., 93.) Much of the argument by which it was attempted to sustain the validity of this promise applies exclusively to promises made for the direct benefit of a wife or child, and has no application to a case where the child, although the promisee, is in no respect the beneficiary of the promise. The Supreme Court, therefore, was clearly right in holding this note to be void; and it seems hardly expedient to encourage further litigation on the subject by reserving to the parties beneficially interested the right to commence a new suit with a view to sustain its validity. The provision in the decree, to that effect, should, I think, be stricken out.

Phelps' Executor v. Pond.

A question of some importance arises under the twenty-first provision of the will, which disposes, upon the decease of the widow, of the fund set apart to secure her annuity of \$5,000. It is objected to this provision that it suspends the absolute ownership of the fund beyond the continuance of two lives. A distinction is taken by the Supreme Court between the first and second clauses of this provision, which is rendered immaterial by the death of the widow. The distinction is not, however, I think, well founded. The provision is, that if the widow shall die before the division of the residue of the estate, then the fund shall fall into and make a part of such residue; but, in case she shall live beyond that period, then it shall be distributed as therein provided. Now, neither clause of this provision would necessarily suspend the absolute ownership for more than two or even more than one life. The final distribution of the fund might have occurred under either clause, in consequence of the expiration of the ten years and the death of the widow combined, without the termination of the life of Anson G. Phelps or of Mr. Dodge. But, before a distribution could be made under either, one or the other of two alternative contingencies must have happened. The three lives must have terminated, or ten years must have expired. Both these alternatives are in conflict with the statute: one, because it suspends the absolute ownership in fact for more than two lives; the other, because it suspends it for a definite period, which may exceed the duration of any two lives which might be selected. There can be no doubt, therefore, that the disposition which the provision in question makes of the widow's fund, after her decease, is void. What, then, becomes of that fund?

Ordinarily, upon the failure of such a provision, the fund, if consisting of personalty, would fall into the bulk of the estate, and go to the residuary legatees, where a residuary clause is contained in the will. But here the residuary clause itself, taken in connection with the fourth clause, which provides for the creation of the fund, is open to the same objection which defeats the provision in the twenty-first clause.

Phelps' Executor v. Pond.

The operation of the fourth and twentieth clauses, combined, would necessarily suspend the absolute ownership of the fund for three lives, or for a definite period of ten years, in connection with a single life; neither of which is allowed by the statute. This fund, therefore, cannot be subjected to the operation of the residuary clause, but must be distributed to the next of kin.

We come now to the consideration of the main objection made to the will. It is insisted that, as a whole, it conflicts with the statute prohibiting accumulations of income, and is therefore void, either *in toto*, or, at least, in respect to many of its principal provisions.

The will contains no express directions whatever for any accumulation; but the position of the counsel for the appellants is, that it was framed upon a plan, or scheme, the object of which plainly was to provide for the payment of debts, and of a very large amount for charitable and other legacies, out of accumulated income, leaving the *corpus* of the estate to be divided at the close of the period of suspension, undiminished by the payment of those debts and legacies, and even increased by advances in value, and the surplus of the accumulations.

It is, no doubt, true, as assumed by the counsel, that implied directions to accumulate are as much within the prohibition of the statute as those expressly given. If, therefore, upon comparing the provisions of the will with the condition of the estate, it is apparent that the testator intended an unauthorized accumulation, this intention cannot be carried into effect, and any provision of the will which is dependent upon it is void. This, however, is never permitted to affect any portion of the will not necessarily connected with the illegal accumulation, and which can be readily executed independently of it.

We are called upon, therefore, to look through this will, and ascertain, if possible, from its various provisions, taken in connection with the proof as to the nature, condition and amount of the estate, the intentions of the testator as to the income of that estate during the period for which the will renders it inalienable. We are furnished by one of the counsel

with a statement, preceding his points, which, in my view, throws considerable light upon this subject. It purports to show the result of paying the debts other than mortgages, and all legacies to be paid within ten years from the testator's death, out of the principal and accumulated income. In making this statement, a serious mistake occurred in the outset as to the amount of the debts. It nevertheless shows, after allowing for this error, that the debts, together with the legacies, to be paid from time to time within ten years, amounting, in the aggregate, to nearly or quite a million of dollars, would be about equaled by the income of the estate during that time, supposing such income to be accumulated whenever there was a surplus. If, instead of being accumulated, the surplus should be distributed at the end of each current year, the aggregate income would, of course, be less; but, still, the disparity between its amount and that of the payments would not be very great. The payments are so distributed by the will, throughout this series of years, that they would be made, to a great extent, from income, whether it was accumulated or not.

From these facts it may, I think, as the appellant's counsel claim, be fairly inferred, that the testator intended that the sums falling due, pursuant to the will, within the ten years, should be paid out of the income of the estate, and that one object of postponing the distribution of the residue was to provide for the payment of these sums, without essentially diminishing the amount to be distributed under the residuary clause. But, does it follow that the will, or any portion of it, is void?

Before answering this question, it will be well to consider what a testator has a clear right to do, without violating any statute. First, then, he may suspend the absolute ownership of his estate, and render it inalienable, during the continuance of two lives in being at his death. Secondly, he may, during this suspension of ownership, dispose of the income annually as it accrues, but cannot direct its accumulation except for a single purpose. Thirdly, he may give vested legacies and provide for their payment at a future definite period. As

Phelps' Executor v. Pond.

these dispositions may unquestionably each be made separately, what prevents their being made in combination? No principle of law or statutory provision is violated by so doing. This is precisely what is done by this will. The whole estate is converted into personalty, and the absolute ownership suspended for ten years, if the two lives selected should continue for that time. Legacies are then given, and the payments so adjusted as substantially to absorb the income as fast as it should accrue. This adjustment is not, and probably could not be, very exact and precise. In some of the years, the payments would be greater than the income, in others less; but these variations are not such as to affect the inference to be drawn as to the testator's object and intent.

There being no express direction to accumulate the surplus income, if at any time a surplus should remain, I see no reason why such a direction should be implied. It is true, it would appear, from the statement referred to, that, without such an accumulation, the aggregate income for the ten years would not be equal to the payments to be made during that time. But this statement is based upon the assumption that real estate worth over a million of dollars would continue to yield during the entire period an annual income of only \$34,000, while the testator may well have supposed that this would be sold and the proceeds invested so as to yield a much larger sum. I see nothing whatever to repel the supposition that the testator expected the annual income, without any accumulation, to be about equal to the annual payments to be made during the ten years. If this was his expectation, the will in this respect would be unobjectionable. Any accidental surplus, upon that assumption, would be so much assets undisposed of by the will.

But, even if it be assumed that the testator intended the surplus income, if any, to be accumulated, and carried forward to the end of the ten years, the result would be the same. This implied direction would be void, but no other provision of the will would be thereby affected. Nothing whatever is made to depend upon such an accumulation. Every provision

Phelps' Executor v. Pond.

could be executed as well without as with it. Its effect would be simply to increase slightly the ultimate fund to be distributed among the residuary legatees. It would be the duty of the executors, therefore, whether an accumulation was or was not intended, to distribute any surplus of income accruing in any year, beyond the payments for that year, among the persons entitled to it. It becomes necessary, then, to inquire, to whom this surplus would belong.

By section 40 of the statute concerning the creation and division of estates (1 R. S., 726), it is provided, that, when the absolute ownership, or power of alienation, of real estate is suspended, and the rents and profits in the meantime are neither disposed of nor directed by any valid provision to be accumulated, "such rents and profits shall belong to the persons presumptively entitled to the next eventual estate." It has been held, in some cases, that this section applies to the income arising from personal property, the absolute ownership of which is suspended by force of the statute concerning accumulations of personal property and expectant estates in such property. (1 R. S., 773; *Haxton v. Corse*, 2 Barb. Ch., 618; *Craig v. Craig*, 3 id., 93; *Kilpatrick v. Johnson*, 15 N. Y., 322.) In none of these cases does the question appear to have received much consideration. As an original question, it would admit, perhaps, of considerable doubt.

But it is unnecessary to pass upon this question here. If section 40 of the statute concerning estates in lands is applicable at all to the income of personal estate, it can only apply to a case where that income is derived from some specific fund, or, at least, from property so situated that its income can be readily distinguished from that of all other property. Neither in terms nor in reason is it applicable to any other case. The statute is founded upon the presumption that the donor of property may naturally be supposed to intend that the income should go to the same person to whom he had given that out of which the income arises. Nothing, therefore, can properly be held to pass under it but income which proceeds from the specific property in which the future interest exists.

Phelps' Executor v. Pond.

The legacies in this case amounted to more than a million and a half of dollars. Very little of this amount was payable until several years after the testator's death, and, in the meantime, the fund out of which it was to be paid was productive of income. No interest whatever is given by the will to the residuary legatees in that portion of the estate which is devoted to the payment of the specific legacies; and yet, if the statute is held to apply, those legatees would enjoy the benefit of any surplus income which might accrue from that, as well as the residue of the estate. It would be impossible to distinguish between the income of the fund belonging to the specific legatees, and that derived from the residue of the estate, as the legacies were payable out of both income and principal. The case cannot, therefore, in any view, be brought within the provision of the statute; and hence, if, after deducting the payments for any year from the income of that year, a surplus of income should remain, that surplus would belong, not to the residuary legatees, but to the next of kin; and the accounts of the executors, for past as well as future years, should be settled upon that basis.

It was held by the Supreme Court that the executors had no right to anticipate, by a rebate of interest or otherwise, the payment of any of the legacies given by the fifth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and nineteenth clauses of the will. This, I think, is correct, so far as the installments to be paid prior to the distribution of the estate, under the twentieth clause of the will, are concerned; for the reason that it was the plain intent of the testator that these installments should be paid from the income of the estate, and to permit them to be anticipated would tend, to some extent, to defeat this intent. This reason, however, has no application to subsequent installments. Upon the distribution among the residuary legatees, the whole scheme of the will will have been consummated. No application of income after that time was contemplated, or none with which an anticipation of the payments would at all interfere. I see, therefore, no objection whatever to any fair arrangement which the execu-

 Chamberlain v. The People.

tors may see fit then to make, for anticipating the remaining installments of the legacies.

There are, I think, no other questions which it is important to consider. The judgment of the Supreme Court will only require one or two slight modifications to make it conform to the foregoing principles; and, in all other respects, it should be affirmed.

All the judges concurring,

Judgment accordingly

CHAMBERLAIN v. THE PEOPLE.

A witness who testifies falsely as to a material fact, is guilty of perjury though he was not a competent witness in the case, and was especially inadmissible to prove the particular fact to which he testified.

So held, where, in an action for divorce, the husband—his wife having borne a child—testified that he had no sexual intercourse with her during marriage.

It seems (per JAMES, J.,) that, in an action between husband and wife, either party is, since the amendment to the Code in 1857, a competent witness against the other, in general, though inadmissible to prove the particular fact of non-intercourse.

Upon an indictment of the husband for perjury, after divorce, the wife is a competent witness to prove that she has had no sexual intercourse with any other person.

WRIT of error to the Superior Court of Buffalo. The prisoner was indicted for the crime of perjury, and, in February, 1859, was tried, convicted and sentenced to state prison. The indictment charged that the prisoner commenced an action against his wife, Margaret Chamberlain, for a divorce, on the ground of adultery; that the summons and complaint therein were personally served upon her; that the action was thereupon referred to a referee, to take proof of all the material

Chamberlain v. The People.

facts charged in the complaint; that, on the hearing before the referee, the prisoner was sworn as a witness in his own behalf; that, on such hearing, it became a necessary and material inquiry whether the prisoner ever had sexual intercourse with his wife after their marriage; and that the prisoner knowingly, corruptly and falsely swore and gave evidence before the referee that he never had sexual intercourse with his wife after his intermarriage with her.

On the trial the judgment record, granting a divorce in the said action, was produced and proved. The referee therein was then sworn as a witness on the part of the prosecution, and was asked "to state what the prisoner testified to on the reference of said action for divorce before him." The question was objected to, on the ground of its immateriality, and, also, because the prisoner was not competent to be sworn therein, and anything testified to by him was not material or admissible, and perjury was not assignable thereon. The objection was overruled, and the prisoner excepted. The witness then testified that the prisoner swore on the reference that he never had sexual intercourse with the said Margaret during the period of their marriage. The marriage of the prisoner and Margaret was proved to have taken place February 9, 1850, and it was also proved that she was delivered of a child in January, 1851.

The prosecution then called Margaret as a witness, and asked, "Have you ever had sexual intercourse with any person other than your husband?" This question was objected to, on the ground that "she was not permitted to testify to any facts proving or tending to prove what transpired during coverture in respect to that subject, and also that such question and her answer thereto were immaterial." The objection was overruled, and the prisoner excepted. She answered, "I have not." Other evidence was given by the prosecution to prove that the prisoner had sexual intercourse with Margaret, after their marriage.

A bill of exceptions was tendered, and the same heard at the general term, where the conviction was sustained:

Chamberlain v. The People.

whereupon the prisoner removed the case to this court for review.

John L. Talcott, for plaintiff in error

Freeman J. Fithian, for defendants in error.

JAMES, J. The bill of exceptions in this case presents but two questions for review. The first is, the prisoner's objection to proving what he testified to on the hearing before the referee in the divorce suit; and the second, his objection to a question put to his wife, a witness after divorce, on behalf of the people. Both were overruled.

The first exception was placed upon two grounds: 1st, That the prisoner was not a competent witness in the action, and anything he might swear to therein was not material or admissible, and that perjury could not be assigned thereon; 2d, That the testimony was immaterial.

The statutes declare that "every person who shall willfully and corruptly swear, testify or affirm falsely, to any material matter, upon any oath, affirmation or declaration legally administered in any matter, cause or proceeding depending in any court of law or equity, or before any officer thereof, shall, upon conviction, be adjudged guilty of perjury." (2 R. S., 681.) The testimony offered to be proven was given before an officer of the court in a proceeding in an action, and was a fact tending directly to establish the main issue submitted to the referee, and therefore material.

As to the competency of a plaintiff as a witness in his own behalf, in an action for a divorce, before the amendments to the Code in 1857, the law was well settled and understood. Since then, there has been considerable conflict of opinion among the profession, and some on the bench. Although no case has yet been decided holding that, in an action between husband and wife, the parties were competent witnesses, it has been decided by the Supreme Court that where a husband and wife were co-defendants they could be witnesses in their

Chamberlain v. The People.

own behalf (*Marsh v. Potter*, 30 Barb., 506.) The hearing in the divorce suit before the referee was after the amendments to the Code in 1857, and that act, as thus amended (Code, § 399), entirely changed the rule of law as it formerly existed in the admission of parties as witnesses. This statute is very broad and comprehensive. It says: "A party to an action may be examined as a witness, *the same as any other witness*," thus placing parties upon the same footing as other witnesses. No limitation, qualification or restriction is imposed by the law-making power, and the courts should refrain from imposing any, unless required to do so by public policy. For the reasons advanced in *Marsh v. Potter* (*supra*), I am of the opinion that the Code covers this case, and that the prisoner was a competent witness in his own behalf in the action for a divorce.

In thus holding, it does not follow that the evidence given on the hearing was admissible. On the contrary, I am clearly of the opinion that it was not. A rule of law intervenes to prevent it. It is well settled that neither husband nor wife are competent to prove non-access during wedlock, whatever may be the form of legal proceedings, or whoever may be the parties thereto. (*Rex v. Book*, 1 Wils., 340; *Rex v. Luffe*, 3 East., 203; *Rex v. Kea*, 11 id., 132; *Rex v. Mansfield, &c.*, 1 Q. B., 444; *Rex v. Sourton, &c.*, 5 Adol. & Ellis, 180.) This rule was established independently of any possible motives of interest in the particular case, upon principles of public policy and decency (*Goodright v. Moss*, Cowp., 594); and it has not been, and was not intended to be, changed or affected by the Code.

Although the testimony inquired after was clearly incompetent and inadmissible in the action in which it was given, still its admission did not render it immaterial. The referee erred in receiving it; but that error did not destroy its materiality. Were it false, perjury could be predicated upon it. It was held, in *Van Steenberg v. Kortz* (10 J. R., 167), that a party erroneously sworn in his own behalf might be guilty of perjury, especially where the proceedings remained unreversed; and the doctrine of that case was approved in *Pratt v. Price* (11 Wend., 128).

Chamberlain v. The People.

The second exception is to the decision of the court overruling the objection to the following question, put to the divorced wife, viz.: "Have you ever had sexual intercourse with any person other than your husband?" The objection was not to the form of the question, and, therefore, the simple proposition is, whether the objection was properly overruled. There is no principle in the law, and no adjudged case, which would authorize the exclusion of the testimony called for by that question. On the contrary, it has been adjudged that a witness, situated precisely as this witness was, in an action of *crim. con.*, was competent, and such testimony admissible. (*Ratcliff v. Wales*, 1 Hill, 63; *Babcock v. Booth*, 2 id., 186.) As the witness had been divorced, the objection rested on the fact that she had been the wife of the prisoner, and, therefore, incompetent to testify to anything that had occurred, even her own criminal act, during coverture. The proposition is, no doubt, fully established by the authorities, that, even after the dissolution of the marriage contract, the husband and wife are not, in general, admissible to testify against each other as to any matter which occurred during the existence of that relation. (*Monroe v. Twisleton*, Peake's Add. Cas., 219; *Doker v. Hasler*, Ry. & Mo., 198; *Barnes v. Camack*, 1 Barb., 392; *State v. Phelps*, 2 Tyler, 374; 1 Greenl. Ev., §§ 337, 338.) In 1st Phillips' Evidence, 83, the reason of the rule is thus stated: "This," as Lord ELLENBOROUGH has said, "is on the ground that the confidence which subsisted between them at the time shall not be violated in consequence of any future separation." The general rule, that the husband and wife will not be permitted to testify as to what occurred during the marriage relation, even after the marriage contract is dissolved, is, no doubt, a wise and salutary rule. Its object is, that the most entire confidence may exist between them, and that there may be no apprehension that such confidence can, at any time, or in any event, be violated, so far, at least, as regards any testimony or disclosure in a court of justice.

But the question now under consideration comes neither within the rule nor the principle of the rule. The witness was

 Caujolle v. Ferrié.

not called upon to betray any trust or confidence which the husband had reposed in her during coverture; nor did the fact which she was offered to prove come to her knowledge in consequence of the marriage relation. It called for acts independent of and outside her coverture. There is nothing, therefore, in the rule of law on this subject which would warrant the exclusion of her testimony in the present case.

In bastardy cases, where the mother is a married woman, it has been uniformly held that the wife was not a competent witness to prove the non-access of the husband; although, from the necessity of the thing, she has been constantly admitted to prove the criminal intercourse by which the child was begotten. (*Ratchiffe v. Wales, supra*, and other cases there cited.)

But the principles laid down in the bastardy cases, and upon which the counsel for the prisoner seem to rely, have no application to the question now under consideration.

Neither of the exceptions to the admission of evidence were well taken; and the judgment should be affirmed.

The court did not pass upon the question of the competency of husband and wife as witnesses against each other generally, in a suit between them.

All the judges concurring in other respects,

Judgment affirmed.

138-139

 CAUJOLLE v. FERRIÉ.

The presumption that an intercourse, illicit in its origin, continued to be of that character, may be repelled by a contrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place.

Thus, in support of the legitimacy of a child, the facts that the father desired to marry the mother, and that, although he might have maintained a meretricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did contract a marriage, in fact, prior to the birth of his child.

28	90
114	118
28	90
153	446

Caujolle v. Ferrié.

The presumption is not overcome by the fact that, having declared and caused to be recorded his purpose to solemnize the marriage by the public acts prescribed by the municipal law of his domicile, such purpose was not shown to have been consummated, and there was an entry upon the record of such declaration importing that nothing came of it.

Nor is it repelled by the omission in the record of the child's baptism, which took place on the day of its birth, of a statement of its legitimacy, though the usage of the time and place appeared to have been to designate as legitimate in similar documents, contracts, &c., those who were in fact such, and the father, mother, and other relatives were thus designated in the contemporaneous writings to which they were parties.

The presumption of legitimacy sustained against many other circumstances tending to an opposite conclusion: *a. g.*, a reputation at the time of the child's birth that the parents were not married; a separation of the parents very shortly after the birth, and no correspondence between them for the remaining years of the father's life; the abandonment of the child by both parents for twelve years; the use by the mother of her maiden name, and the designation by her of the child as her nephew.

APPEAL from a judgment of the Supreme Court, affirming a decree of the Surrogate of the county of New York, by which letters of administration upon the estate of Jeanne Du Lux, who was domiciled in that city, and died in November, 1854, were granted to John P. Ferrié, as the legitimate son and sole next of kin of the deceased. His claim to administration was contested by the appellant, Caujolle, in behalf of himself and others, residents of France, who claimed to be the next of kin of the deceased; and they insisted that Ferrié, who was undeniably her natural son by one Valentin Ferrié, was not born in wedlock, and, hence, was not legitimate. The question, whether he was legitimate or not, was the only point in the case. The deceased, whose original name was Jeanne Icard, was a native of Pau, a city in the south of France, where she was born on the 24th day of November, 1777. That date was established with certainty by the production of an authenticated copy of the entry of her birth and baptism, remaining in the records of a parish church in that city, and also in the records of the municipality. She was the daughter of John Icard and of Magdalen Riviere, people of humble condition, residing at Pau. Her father died when she was

Canjolle v. Ferrié.

about eight years old, and her mother afterwards went to live at Biert, a small village in the department of L'Arriege; and Jeanne, at a later period, went to service as a domestic in a family at Massat, a neighboring village. From thence, about the year 1798, she went to St. Giron, a city in the same department, and became a servant of one Anère, a merchant. Here she formed an intimacy with Valentin Ferrié, the son of Balthazar Ferrié, a tanner and the next-door neighbor of Anère, the result of which was that she was likely to become a mother. The father of Valentin objected to his marrying her, as he was desirous of doing, on account of their inequality of social condition; the family of Ferrié being small proprietors, and the friends of Jeanne being poor and herself a domestic servant. Shortly before her confinement she left Anère's for a house in the outskirts of the city, where she lived with Ferrié, and where she gave birth to the respondent, on the 30th June, 1800. Prior to this, an entry had been made in a register of publications of marriage in the archives of the mayoralty of St. Giron, of which the following is a translation: "This day, the fourteenth Floreal, the year eight of the French republic [corresponding to May 4, 1800], I, the undersigned, municipal agent of the commune of St. Giron, have published aloud, by word of mouth, before the outer and principal door of the Maison Commune of St. Giron, in execution of the law of the 20th September, 1792 (old style), that Valentin Ferrié, nineteen years of age, son of Balthazar Ferrié and of Frances Cazes, tanner, resident of St. Giron, and Jeanne Icard, twenty-one years of age, daughter of Jean Icard and Magdalen Riviere, native of Massat, resident at St. Giron, intend to execute the *acte* of their marriage on the twentieth of the current month, at ten o'clock in the morning, before the president of the municipal administration of the canton of St. Giron. And I have caused this present publication to be posted up by copy before the door." In the margin of this entry there was written the French word *neant* [null, or nothing], in a large hand, from which a line was drawn diagonally across the entry, which was crossed by another similar line. The ink of this

Caujolle v. Ferrié.

marginal entry, and of the lines, was yellow and faded, and so far as could be judged, the writing was of the same date with the original record. The person who had the custody of the records at the time was dead. The certificate of the mayor of St. Girons was produced, to the effect that no entry of any civil act of marriage of Valentin Ferrié and Jeanne Icard could be found in the archives of the city, though the book containing entries of that character, embracing the time of the birth of the respondent, existed there. Similar evidence was given in respect to the neighboring communes in which Jeanne Icard was shown at any time to have lived. But, in the baptismal records of the parish church of St. Girons, an entry was found in the following words: "Year 1800. Balthazar Pierre Ferrié, son of Valentin and of Jeanne Icard, was born and baptized the thirtieth of June, eighteen hundred. Godfather, Balthazar Ferrié. Godmother, Rose Ferrié. In proof of this, Baque, *Cure of Ledor*."

A commission, awarded by the Surrogate, in which two members of the bar of the city of New York were named as commissioners, was executed by them, in France, in the autumn of 1855, and the testimony of several witnesses, many of them aged persons, residing at Biert, Massat, Castillon, and St. Girons, was taken and returned. A large number of letters and papers were found at the last residence of the deceased in New York, where she had resided, with the exception of a voyage to France taken in 1815, since the year 1807. The testimony and documents returned with the commission, the letters and papers so found in New York, and the evidence of a number of witnesses who had known the deceased in that city, together with the proof of the law of France respecting births, marriages, &c., constituted the proofs on which the case was heard. The material portions of it are referred to in the following opinion, and the evidence is stated more at large in the report of the case in the Surrogate's Court. (4 Bradford R., 28.)

From the judgment of the Supreme Court, affirming the Surrogate's decree, an appeal was taken to this court by the

Canjelle v. Ferrié.

the association and friendship of his family, and the disruption of his business relations. His flight from his father's house can only be accounted for on the assumption of his intention to marry Jeanne. Neither his father nor any other member of his family objected to his connection with the respondent's mother, as his mistress; but, to secure his marriage with her, flight from his home and estrangement from them were the inevitable necessity and result. These he met for this purpose; and when we see that such estrangement continued, and friendly relations with them were never resumed, can we doubt that he consummated his intention, and that the knowledge of that fact was the cause of the original and continued estrangement and separation from his family? In addition to this, and as evidence of the change of their condition, we have the public proclamation of the intended celebration of marriage, on the 20th of May, before the president of the commune of St. Giron, and the public record made thereof. It is true, no *acte* of marriage has been found on record; and it will be seen hereafter how much importance is to be attached to that circumstance. Then we have the removal of father and mother together to the house of Benóz, where they cohabited together, and lived as husband and wife. The only two witnesses who knew them at that time, who have been examined, were Daffis, the friend of Valentin, and De Galai, a female friend of Madame Anére and Jeanne. Daffis says they lived together one or two years, and she had a child by him, born and baptized at St. Giron. He speaks of the opposition of the father of Valentin to the marriage, and that he charged his son with stealing leather from him to procure money for Jeanne. The child took the name of Ferrié there. He never knew whether Valentin was married to Jeanne or not. He did not know whether she was his wife or not. He never heard anything said of a proposed marriage between Jeanne and Valentin. Miss De Galai, who was two years the senior of Jeanne, seems to have known her well at St. Giron. She did not know that she was married; but she lived with Ferrié a long time at M. Benóz; that they lived together there; that they cohabited

there. She had a child there, and which was baptized. They lived together some time before and after the accouchment; that they lived together as if they were husband and wife. She did not know of any act of marriage existing between them; that they were both together when the child was sent to nurse. She understood they wished to be married, but did not know whether they were or not. Valentin was present at the accouchment. She had heard Ferrié speak of Jeanne by the name of Ferrié. She recollected well that they both went to see the child at nurse; and they went to Bordeaux together. The people of the quarter where she lived called her Madame Ferrié. She had heard them call her so many times. She had heard Ferrié speak of her by the name of Ferrié. She had heard Madame Anére call Jeanne Icard Ferrié many times; and M. Anére called her by that name. I dismiss from consideration the testimony of the other witnesses at St. Giron, as most of them have been born since Madame De Lux left there, and they speak of reports and conversations which evidently were of recent origin. There is one exception to this remark, and that is Catherine Ferrié, widow of D'Apus, the sister of Valentin. She was only five years old at the birth of the respondent, and at the time Valentin and Jeanne left St. Giron, she did not know they were married. She knew that her brother quitted her father's house, and occupied a chamber with a woman who was a servant next door; that her father opposed the marriage, and the family recognized Jeanne as the "*bonne amie*," or mistress, of Valentin, and not his wife, as they were opposed to that; that they left St. Giron together. She manifestly knew nothing of the *status* of the respondent, as she stated he died right away after his birth. She says: "After Valentin left his father's house he never returned to it again to live. His father refused to hold any relation with him. Valentin wished to marry Jeanne. His father did not wish him to marry Jeanne, and his father would not hear it spoken of, and forbid the children to go and see him after he left the house. Valentin wished to marry her before he left the house. I was too young for him to talk to

Caujolle v. Ferrié.

me about it, but it was well known in the family and discussed. Valentin worked at his occupation with his father, but after his flight from the house he worked for him no longer. He worked for some of his brothers who worked at the same trade, and who had tanneries. I know of no other objection that his father had to the marriage than that she was a servant. On that account the family were opposed to it." The respondent was examined before the Surrogate, and testified that his mother told him that she and his father took him to the nurse and left him there; that she went almost every week to see him, but he only went two or three times. "She did not say how she was married. I could never ask her any questions on that subject. When I was baptized, my godfather was my father's brother; his name was Ferrié. Thinks his godmother was some relation to his father's family." From these facts, what are the probabilities of the marriage of Valentin and Jeanne? I must say they are persuasive in impressing my mind with the conviction that they were actually married, and I think at or about the time of the flight of Valentin from his father's house, and which must have been before he went to the house of Benóz, and before the birth of the respondent. I will here take the occasion to say, that the testimony has satisfied me that, with the exception of the illicit intercourse between the parties, their characters were good, and no cause of reproach, or suspicion derogatory to either, existed or had any circulation, until after they left St. Girons. I think the reports of the *liasons* of Jeanne, and rumors prejudicial to her and of the illegitimacy of the respondent, testified to by the various witnesses, may all be traced to the known and avowed fact of her living with respondent's father and having had a child by him, and the notorious hostility of Valentin's father and family to his marriage, and the assumption that such hostility had been effectual to prevent it. His family regarded such a marriage as disgraceful to them; they had, therefore, every motive to deny it publicly. They never admitted its existence, preferring to disgrace their relative by causing it to be believed that Jeanne was his mistress, and that his issue by

her was a bastard. Their passions were excited by his flight from his father's house, and his avowed determination to forsake all others and cleave only unto her. They have always persisted in this course of action ; and this satisfactorily accounts to my mind for the interpolation, upon the record of the intention to celebrate the act of marriage, of the word "*neant*," or null. The law authorized no such proceeding, and it is, therefore, to be presumed it was not done by any public officer in discharge of his prescribed duties. If, as was contended on the argument, Valentin was a minor at the time, and this entry is to be regarded as evidence that his father refused his consent, and therefore the intended marriage was null, it is a conclusive answer to say that the law, in such a contingency, prescribed a different form for indicating these facts. The marriage of a minor could be opposed by the father ; and if such opposition was made, the law prescribes the mode and manner of determining its reasonableness, in the nature of a judicial proceeding ; and a copy of the judgment thereon is to be delivered to the public officer having charge of the record of publication, "who shall make mention of them in the margin of the record of opposition on the record of publication." It is clear that the entry of the word "*neant*" in the margin of the record of publication, in the present instance, was not made in conformity with this provision of law, and did not, therefore, proceed from any act of opposition made in compliance with its terms. It is, therefore, null and of no legal significance. It does not appear when, or by whom, it was made, whether before or after the death of Valentin Ferrié. I think it more probable that it was written there after the death of Valentin, and by some of his relatives, to efface the only record evidence of his marriage with Jeanne. The determination on their part never to recognize any such marriage stands out clear and undisputed ; and it would be natural for them, after the death of Valentin and the departure of Jeanne to America, and the supposed death of their issue, to do what they could to efface the evidence of what they regarded as a stain upon their family. They could not destroy the record ; they could not obliterate

Caujolle v. Ferrié.

what was written; they could not get an act of opposition, for the reasons which will be presently stated; and, therefore, all they could do was to assume that the *acte* of marriage had never been celebrated, and either by their own hand write in the margin of the record the word "*neant*," or prevail on the officer having it in charge to do so, on the representation that no act under it was ever performed. In either aspect it had no legal warrant, and is not entitled to any weight as evidence that a marriage between the parties never took place. On the reëpearance of Madame De Lux at St. Giron, with her son, this persistent declaration of the family, that no marriage had taken place between Valentin and Jeanne, and this aspect of the record, might well serve to convey the impression that such issue was illegitimate. To circulate such a report, and cause it to be generally believed, was in harmony with the avowed purpose of Valentin's family, that he should not marry Jeanne, and, after he had left his father's house for that purpose and lived with her as her husband, to have it understood and believed that such connection was meretricious.

This seems an appropriate place to consider whether any opposition, under the French law, to the marriage, could legally have been made. The act of 1792, which was in force at the time, prohibited the marriage of minors, that is, persons under the age of twenty-one years, without the consent of their father or mother; that the consent of the father was sufficient, and only those persons whose consent is required for the marriage of minors could offer or make an act of opposition. I think I have satisfactorily shown that no opposition, in the meaning of these provisions, was made to this marriage by the father, and that the entry of the word "*neant*" has no connection with this act of opposition, as defined and regulated by the French law. But I think a more satisfactory and conclusive answer can be given to this view of the case. The evidence has satisfied me that no act of opposition could be made, for the reason that both of the parties at the time had attained their majority. It is true that the declaration of intention states the ages of the parties, and states that Valentin is aged nineteen years and

Canjolle v. Ferrié.

Jeanne twenty-one years. It is to be observed that the law does not require the ages of the parties to be stated in this *acte* of publication. It is, therefore, surplusage, and not entitled to much consideration. It is clear that Jeanne's age is not truly stated, as she was then twenty-two years old, and on the 24th of November following would have been twenty-three. The statement of Valentin's age is only presumptive evidence, and though, if he were a party here, on the assumption that he caused the act of publication to be made, it would be regarded as truly stated, yet clearly he would have been at liberty to have shown that his age had been erroneously stated. I see no ground upon which he would be estopped from showing the truth in this respect. *A fortiori*, if he would not, the respondent is not precluded from establishing what his age actually and truly was at that time. I think the evidence satisfactorily shows that Valentin Ferrié, at the time of the act of publication, was of full age, and could lawfully enter into the contract of marriage, without reference to the consent or opposition of his parents. Two only of the witnesses who have been examined speak as to his age, and both, I think, establish that he was then of full age. His sister, the widow D'Aplus, who must be presumed to know his age the most accurately, says that, at the time of her examination, in September, 1855, she was sixty years of age. She must, therefore, have been born in the year 1795. She also states that Valentin was twenty years older than she was. If this be true, and I can see no reason to doubt it, he was consequently born in the year 1775, and was twenty-five years of age in 1800—a reasonable and proper age to contract matrimony with a girl about two years his junior. The Chevalier Daffis, the only other witness who speaks in reference to his age, does not speak with the same exactitude and certainty, and cannot be presumed to have that accurate knowledge on this point which his sister possessed. He said he was seventy years of age in September, 1855. I understand by this expression that he was past seventy and not yet seventy-one. He knew Valentin Ferrié well. He was six years older than himself. It follows,

Caujolle v. Ferrié.

therefore, from this statement, that Valentin must have been born in 1778 or 1779. I place more reliance on the testimony of his sister; and I only refer to that of Daffis as confirmatory of her evidence. Valentin was, I think, in fact, nearly ten years older than the Chevalier; and the apparent discrepancy between his statement and the positive testimony of the sister does not, in my judgment, weaken at all that of the latter. I assume, therefore, that it is established that Valentin was of lawful age to contract matrimony in May, 1800, and under no disability whatever by reason of non-age.

In support of the view that the marriage relation existed between him and Jeanne, in addition to the facts already referred to, may be cited that, in his presence, without dissent on his part, she was called by his name and known by it; and a strong circumstance in corroboration of this position, to my mind, is, that the child born to him by her took, with his privity and by his procurement, his own name, by which he has always been known, through the whole of his life. The *acte* of baptism, procured by him on the day of the birth of his son, when, we know, the mother must have been in the house of Benóz, speaks a most significant language. He takes his offspring, immediately upon its birth, accompanied by two of his relatives, who assume the responsible offices of godfather and godmother, to the curé, and has him baptized according to the rites of the church and a public record made thereof, and that he was the son of Valentin Ferrié and Jeanne Icard. If it was the child of shame and disgrace, we can hardly find a motive for thus hastily making an enduring record of the infamy of the parents and a perpetual memorial of their son's dishonor. Much stress is laid on the circumstance that, in this record, Jeanne is described as Icard, and not Ferrié, as it is urged she would have been if, in fact, she was his wife. It is quite apparent that it was the custom of the French people in that vicinity, in public acts of this character, in speaking of a female, although a married woman, to designate her by her maiden name. In the *acte* of the publication of the marriage, Valentin is described as the son of Balthazar Ferrié and of Francés Cazes—Cazes being the

Canjolle v. Ferrié.

maiden name of his wife; and Jeanne is described as the daughter of Jean Icard and Magdalen Riviere. In each instance the wives of Ferrié and Icard are called by their maiden names. So in the registration of the disposition of the assets of Balthazar Ferrié's wife, made by their children in 1816, she is called Francoise, or Francés Caze, their mother; and in the registration of the assets of Balthazar Ferrié, made by his children in 1823, he is spoken of as Balthazar Ferrié their father and father-in-law, widower of Francoise Caze their mother. So in the record of baptism of Jeanne, she is described as the daughter of Jean Icard and Magdalen Riviere. So also in the record of the baptism of her brother Alexis, he is described as the son of John Icard and Magdalen Riviere his spouse. In like manner, in the record of the baptism of her sister Jane, she is described as the daughter of John Icard and Magdalen Riviere. And in the record of the marriage of the parents of Jeanne, her father is described as the son of John Icard and Louise Fischéere, and her mother as the daughter of P. Rivierre and of Catherine Lafitte. I think, therefore, the argument that these parties were not married derives no force from the circumstance that Jeanne is described in the baptismal record by her maiden name, instead of that of Ferrié. We see that the same practice was uniformly adhered to in reference to those about whose marriage no doubt can be raised; and I think, in this connection, it should be observed, that no inference adverse to the conclusion that she had been married to Ferrié is to be drawn from the fact that, in the certificate of marriage with De Lux, she is described by her maiden name of Jeanne Icard.

I arrive at the conclusion, from all these facts, that we can assume that there was a marriage celebrated between Valentin and Jeanne, either *per verba de presenti*, or before some proper officer, in fulfillment of their publicly declared intentions. I give great consideration, and to which I think it is entitled, to the solemn declaration of Madame De Lux on her death-bed, that she had been married in France during the Revolution. Such declaration, coupled with the frequent assertion that the respondent was her sole heir and would take all she left, could

Canjelle v. Ferrié.

only refer to a marriage with the respondent's father; and I have no doubt that marriage was in her mind at the time she had the conversation with Madame Grieser. The declarations of the parties, if deceased, that they were married, provided they were made *ante litem motam*, are admissible evidence of the fact declared. Such declarations, made by the parents in life, are admissible as evidence to establish the legitimacy of their issue. (*Goodright v. Moss*, Cowp., 591, and cases there cited. See also the answer of the judges to the third question put to them in the Berkley Peerage Case, 4 Camp., 418.) The mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, we are bound to assume it to be moral rather than immoral; and credit is to be given to their own assertions, whether express or implied, of a fact peculiarly within their own knowledge. (Hubback on Succ., p. 248, citing *Rex v. Stockland*, Burr. S. C., 508; 1 W. Bl., 367; *Revel v. Fox*, 2 Ves., Sr., 270; *Doe, ex dem. Fleming, v. Fleming*, 4 Bing., 266; *Hervey v. Hervey*, 2 W. Bl., 877.) "Cohabitation," says Lord STAIR (Inst., lib. 1, tit. 4), "and the behavior of man and wife for a considerable time, presumeth marriage, though there be neither contract, promise, nor sponsalia preceding, nor evidence of copulation by children." How much more reasonable the presumption in the present case, where clearly there was a contract and promise, and there is evidence of copulation by the birth of a child. In *Devereux v. Much Dew Church* (1 W. Bl., 367), being a question upon the validity of a marriage which was alleged to have taken place after the marriage act of 26 Geo. II, Lord MANSFIELD said: "In a suit in the Ecclesiastical Court for jactitation of marriage, perhaps it may be necessary to prove that all the solemnities of the marriage act have been practically and regularly complied with. But God forbid, that, in other cases (the legitimacy of children and the like), the usual presumptive proofs of marriage should be taken away by this statute."

Hervey v. Hervey (2 W. Bl., 877), was a suit for jactitation of marriage, and it was insisted that direct proof of an actual marriage was essential; and the Chancellor of London and the Dean of the Arches held that the canons did not allow a marriage to be proved, *inter vivos*, by mere circumstantial evidence; but on appeal to the Delegates it was held that the evidence showed a most solemn and deliberate acknowledgment and avowal on the part of the plaintiff, the husband, of the truth of the marriage that could be devised, and that he should not now be admitted to controvert or impeach it. And they therefore unanimously pronounced for establishing the marriage. A prominent circumstance relied on as establishing the fact of marriage was that a child, born a few weeks after they proclaimed and acknowledged they were married, was christened, and a brother of the husband and an uncle of the wife were two of the sponsors, and the child was registered as the son of Thomas and Ann Hervey. In the present case the baptismal record was made at the instance of the respondent's father, and he is therein truly described as the son of Valentin Ferrié and Jean Icard. Does this mean the bastard son of those parents, or their legitimate offspring? The law presumes the latter, and such presumption must control until overthrown.

Wilkinson v. Adam (1 Ves. & Beame, 422) strongly corroborates this view. At page 462, the Lord Chancellor ELDON says, the rule cannot be stated too broadly, that the description, "child, son, issue," every word of that species, must be taken, *prima facie*, to mean legitimate child, son, or issue; and at page 466 he also says that all the cases go to this, that the description of son, child, &c., means, *prima facie*, legitimate son, &c. When, therefore, in the solemn act of baptism, the respondent is described as the son of Valentin Ferrié and Jeanne Icard, we are justified in holding that his legitimacy is established, *prima facie*.

But it is strenuously insisted that the non-production of the act of marriage between the respondent's parents, or other direct or positive proof of a solemnization of marriage between them, are sufficient to overthrow the presumption which the

Caujolle v. Ferrié.

law makes of the *prima facie* legitimacy of the respondent. The principles of the common law regulating marriage in this State are few and simple. To render it legal and valid, no ceremony, no solemnization, by minister, priest or magistrate, are required. Consent of the parties is the only requisite, and the marriage contract is complete when there is a full, free and mutual consent by the parties capable of contracting, even when such consent is not followed by cohabitation. (*Jackson v. Winne*, 7 Wend., 47.)

The case of *Fenton v. Reed* (4 Johns., 52), is entitled to more than a passing notice. The point in controversy was, whether the plaintiff was the widow of Reed. In 1785 she was the lawful wife of a man named Guest. In that year Guest left the State for foreign parts, and continued absent until 1792; and it was reported and generally believed that he died in foreign parts. The plaintiff, in 1792, married Reed. In that year, and after the marriage, Guest returned to this State, and continued to reside here until June, 1800, when he died. He did not object to the connection between the plaintiff and Reed, said he had no claim upon her, and never interfered to disturb the harmony between them. After the death of Guest the plaintiff continued to cohabit with Reed until his death in September, 1806, and sustained a good reputation in society; but no solemnization of marriage was proved to have taken place between the plaintiff and Reed, subsequent to the death of Guest. The suit was brought to recover money which she would be entitled to if the widow of Reed; and, to maintain it, she sought affirmatively to establish her marriage with Reed. The court declared that the marriage of the plaintiff with Reed, during the lifetime of her husband Guest, was null and void; that she was the lawful wife of Guest, and continued so until his death in 1800; and the true question was, whether there was evidence sufficient to justify the court in concluding that she was afterwards married to Reed. And the court also say: "It is stated that there was not proof of any subsequent marriage *in fact*, and that no solemnization of marriage was shown to have taken place. But proof of an actual marriage was

not necessary. Such strict proof is only required in prosecutions for bigamy, and in actions for criminal conversation. A marriage may be proved in other cases from cohabitation, reputation, *acknowledgment of the parties*, reception in the family, and other circumstances from which a marriage may be inferred. No formal solemnization of marriage was requisite. * * A jury would have been warranted, under the circumstances of this case, to have inferred an actual marriage, and the court below had sufficient ground to draw that conclusion; and, as they have drawn it, we will not disturb it." If the circumstances in that case authorized the inference of an actual marriage, how much stronger are they in the case now under consideration. There the intercourse between the parties was originally meretricious, and they confessedly lived in adultery until the death of Guest, in 1800. No fact was presented, other than that they continued to live together until Reed's death, from which the inference of a marriage after Guest's death could be inferred; and it is to be observed, also, that, in this case, the plaintiff sought affirmatively to establish the fact of her marriage with Reed. Less stringent proof is, however, required in matter of pedigree; and the rule would seem to be well settled, that *semper presumitur pro legitimatione puerorum*. (5 Rep., 98b; *Vowles v. Young*, 13 Ves., 145.) The law is unwilling to bastardize children, and throws the proof on the party who alleges illegitimacy; and, in the absence of evidence to the contrary, a child, *eo nomine*, is, therefore, a legitimate child. (2 Hagg. C. R., 197; 4 Eng. Eccl. R.; 13 Ves., 145; *Wilkinson v. Adam*, *supra*.) And, in *Vowles v. Young*, the Lord Chancellor ERSKINE said, in reference to proof of an actual marriage, that the evidence, especially in the case of obscure families, must be very slight. As sustaining the same rule may also be cited *Starr v. Peck* (1 Hill, 270); and the qualification of that case, as made in *Cheney v. Arnold* (15 N. Y., 345), does not weaken its authority on the question of the duty of this court to presume matrimony, when the parties have cohabited, and there are circumstances from which a present contract may be inferred.

Caujolle v. Ferrié.

I have been unable to find any authority in this State, on a question of legitimacy, which requires the heir, and acknowledged and conceded child, to prove an act of marriage as a requisite to maintain his legitimacy. The presumption and the charity of the law are in his favor; and those who wish to bastardize him must make out the fact by clear and irrefragable proof.

A striking and leading case, as to the controlling character of presumptions, is that of *Piers v. Piers* (2 H. of Lords Cases, 331). Piers had long been living in concubinage with a woman by whom he had several children. In expectation of the birth of another child, and that he might have lawful children to inherit his estates, he and the mother of his children desired to be married. And a marriage was alleged to have been celebrated between them in form, but no license was shown from the bishop, nor any entry found in the marriage register. After the birth of two more children, and six years subsequently, a marriage was again celebrated between them, according to law and the forms of the established church, and the lady was described in the marriage certificate by her maiden name, and a child, born after the first and before the second marriage, was baptized as the child of the wife by her maiden name. The question arose as to the legitimacy of the two children born after the alleged celebration of the first marriage and before the second ceremony of marriage. The House of Lords affirmed the legitimacy of the two children born after the first marriage, holding that, so strong was the presumption in favor of marriage, that it was not rebutted by the circumstances appearing in the case. The principle, fully recognized and established in this case, was, that the question of the validity of a marriage cannot be tried like any question of fact which is independent of presumption, for the reason that the law presumes strongly in favor of marriage, particularly after the lapse of a great length of time. And it is to be observed that the length of time and other circumstances existing in the present case greatly increase the embarrassment and difficulty of proving a marriage over those which appeared in that case.

Canjolle v. Ferrié.

Consequently, we are to give greater weight to the presumption in favor of the marriage, and to be satisfied with proof of a less decisive character. The court, in *Piers v. Piers*, seemed to adopt the doctrine laid down by Lord LYNDHURST, in *Morris v. Davies* (5 Cla. & Fin., 163), that "the presumption of law is not lightly to be repelled; it is not to be broken in upon or shaken by a mere balance of probability; the evidence for repelling it must be strong, satisfactory and conclusive." Lord COTTENHAM, in *Piers v. Piers*, stated the proposition in these words: "A presumption of this sort in favor of a marriage can only be negated by disproving every reasonable possibility." "You should negative every reasonable possibility." Lord BROUGHAM criticised the expression used by Lord LYNDHURST in *Morris v. Davies*, that the evidence to repel the presumption must be "conclusive," and did not concur with him in that respect; but I understand him as going to the full length of affirming the rule as stated by Lord COTTENHAM.

Applying these principles to the case under consideration, we start with the presumption in favor of the marriage, and which "can only be negated by disproving every reasonable possibility." Now, I think the circumstances adduced to overcome this presumption fall far short of accomplishing that object; and those of a contrary character not only more than repel this counter proof, but sustain strongly the presumption that the law makes. (See also the cases of *Gaines v. Chew*, 2 How. U. S. R., 620; *Patterson v. Gaines*, 6 id., 550.)

The learned Surrogate has shown, I think, satisfactorily, that the non-production of the *acte* of marriage, under the circumstances disclosed in this case, does not overcome the presumption of law or the conclusions of fact derived from the proofs in this case. The authorities cited by him from the French text-writers, and the cases decided in the courts in France, show, I think, conclusively, that if this case was pending in the tribunals of that country, the legitimacy of the respondent would unquestionably be established. As the *status* of the respondent must, perhaps, be governed by the rules of law applicable to the marriage relation existing there at the time

Caujolle v. Ferrié.

of his birth, it is satisfactory to know that the well-established principles prevailing there lead to the same result as those which have been recognized here.

I have arrived at the conclusion that the presumption of law in favor of the marriage of the respondent's parents, and his legitimacy, have not been negatived and overthrown by the proof adduced by the contestants; but that such proofs, in connection with this presumption, lead to the conviction in favor of such marriage and his legitimacy.

It follows, that the judgment of the Surrogate and of the Supreme Court should be affirmed.

LOTT and MASON, Js. (the latter with some hesitation), concurred in the preceding opinion, as did SELDEN and HOYT, Js., who, not believing Valentin Ferrié was of age at the time of the publication of the bans, thought both parties anxious for a marriage, in fact, and that there was nothing to prevent their accomplishing this purpose in a private and informal way.

DENIO, J. (Dissenting.) The French law, respecting the authentication of births, marriages and deaths, which was in force at the time of the alleged marriage of the intestate to Valentin Ferrié, was that which was promulgated by the National (legislative) Assembly, on the 20th September, 1792. A copy of this law was given in evidence. So far as it is material to the present question, it declares that minors cannot be married without the consent of their fathers, if living, or, if not, of their mothers; and the age of majority is fixed at twenty-one years. It is declared that marriages contracted against these provisions are void. The marriage engagements, or bans, are to be published at the actual place of residence of each of the parties; and, in the case of minors, at the place of actual residence of their fathers and mothers. The act of publication is to be entered in a special register, which must be preserved in the archives of the municipality. It is to contain the christian names, surnames, professions and places of residence of the future husband and wife, those of their fathers and

mothers, and the day and hour of publication, and to be signed by the public officer, to be proclaimed before the principal outer door of the town hall (*maison commune*), eight days before the marriage, and to be posted on a tablet kept at the outer door. Persons whose consent is necessary may oppose the marriage. The opposition is to be made in writing, signed by the party opposing, and notice of it is to be given to the parties, and to the public officer, and the latter is to make a brief note of it in the register of publications. The validity of the opposition is to be determined by a *juge de paix*, who is to decide in three days, and there is an appeal to the tribunal of the district, which must give judgment in one week. A note of the judgment is to be made in the margin of the record of opposition, in the register of publication. The law then provides for the forms to be used by the parties and the officer, in concluding the actual contract of marriage. The parties are to declare that they take each other in marriage, and the public officer is to pronounce that they are united in marriage. The act of marriage (or legal document evidential of the transaction) is to be drawn up by the officer, and is to contain, besides the names and residences of the parties, a number of particulars arranged under six separate heads, including a statement of the consent of the persons whose consent is made necessary, and is to be signed by the parties and officer, by four witnesses, and by the relatives present. It is to be inscribed in duplicate registers, provided by the municipality; one duplicate is to be preserved in the municipal archives, and the other to be kept in the archives of the department.

It does not appear to me necessary to inquire what would be the effect of a marriage actually concluded without the observance of these formalities, or without the consent of parents where the parties or one of them were minors, since the question now presented is whether these parties were married at all. If an actual marriage were shown, and the married parties had subsequently cohabited together with the knowledge of the parents, the offspring would, I presume, be considered legitimate, notwithstanding the strong declaration of the law, that

Canjolle v. Ferrié.

marriages contracted against its provisions should be void. Indeed, I think the intention of the law is to conclude the parents, where they neglect to interpose objections after being duly notified of what is going forward, by the publication of the bans in the manner stated. The French civil code, called the Code Napoleon, promulgated in 1808, declared that a marriage contracted without the consent of parents, where such consent was necessary, could only be impeached by the parties whose consent was requisite, or by such of the two married persons as stood in need of such consent; and that it could not be questioned at all on that ground, where it had been approved expressly or tacitly by those whose consent was necessary, or when a year had elapsed without complaint on their part subsequently to their knowledge of the marriage. (Book I, Title V, Articles 182, 183.) These provisions may not be specifically applicable to marriages contracted under the law of 1792; still, if it could be shown that these parties were actually married before the birth of the respondent, though no evidence of the consent of the father of the husband could be shown, there would be so strong a presumption of his acquiescence that the issue would be held legitimate. But in prosecuting the inquiry whether the parties were really married, the provisions of the law of 1792 furnish important aid. It is quite clear that Ferrié, or those who acted in his behalf in the publication of the bans, were acquainted with the provisions of the law, and had a general intention of conforming to them. The entry, or act of publication, as it is called, states on its face that it is made "in execution" of that law, which is referred to by its date, and it contains, with considerable, though not precise accuracy, the several matters required to be stated. We have, then, this state of facts satisfactorily established: an illicit intercourse between these young people, about to result in the birth of a child; a desire on their part to be married, opposed by the father of Ferrié, the intended husband, and a condition of the law of the country which would render his opposition entirely effectual if it should be exerted, but which he might waive either by express consent or by silent

acquiescence on being legally notified, by the publication of the bans, of the attempt of the parties to be married. Then there is a day fixed for the celebration of the marriage, and the notice required by law is given by public proclamation, and by posting up in the town hall, in the place where the parties and the father of the proposed husband dwelt.

In this statement of the circumstances surrounding the alleged marriage, I have assumed that Valentin Ferrié was a minor, and therefore subject, in this respect, to the will of his father. The record states that he was nineteen years old. This seems to me very satisfactory evidence that he had not attained his majority, though I observe that, in the opinion of the Surrogate, it is suggested that he may have been of age, and that the statement in the entry may be erroneous. I do not feel the force of the suggestion. Besides the general presumption in favor of a fact stated in a contemporaneous written document, prepared at the instance of a party to whom the fact was known, there are special reasons for confiding in the correctness of this record of Ferrié's age. He wished to be married, and caused the publication to be made for that purpose. If he could have truly stated that he was of lawful age, no opposition arising out of the want of parental consent could be made. He had thus a very strong motive for declaring himself to be of age, if he could do so consistently with the truth; for then the known repugnance of his father to the marriage would be of no avail. But he caused himself to be published as a minor, and thus admitted that his marriage could be prevented by the opposition of his father. But there was a misstatement as to the age of the proposed wife, which was set down as twenty-one years, when she was actually twenty-three, as is shown by the registry of her birth, and it is urged that a mistake might just as readily have occurred in respect to his age as to hers: but the argument that because an error is shown, the other statements are incorrect, would not be a cogent one in any case, while here circumstances exist which show a motive for an understatement of her age. She was, on the assumption that the record is accurate in the parts in which it is

Caujolle v. Ferrié.

not contradicted, about to marry a man some years her junior, and would naturally be disposed to make the difference appear as small as possible. Reducing the disparity would be likely to advance the marriage, by deceiving his relatives, and could not prejudice it in any way. The fact that she was born in another town, would enable her to do this without fear of detection, which would not be the case as to Ferrié's age, the publication being in the place where he was born, and had always lived and where he had a numerous kindred. Besides, she had habitually claimed to be younger than she was. In her French passport, granted in 1815, when she was thirty-eight years old, she caused herself to be described as thirty. In her contract of marriage with Du Lux, in 1812, when she was thirty-five, she was stated to be thirty-two; and to witnesses in New York she stated that her child, by which she was understood to mean the respondent, was born when she was only fifteen, whereas she was then twenty-three. The Surrogate considers that the record is contradicted in this respect by the testimony of the witness, Daffis, and by Catharine Ferrié. The former, who stated he was seventy when he gave his testimony, had been a soldier of the first Empire. He said, in a general way, and apparently without any reference to the bearing of the testimony upon the integrity of the statement in the register of publications, that Ferrié was six years older than he was. Catharine Ferrié, widow of another Daffis, was Valentin's sister. She said she was sixty years old and, in the same incidental way, that Valentin was twenty years her senior, which would make him twenty-five at the time of the publication, which, upon all the evidence, is highly improbable. She was apparently an ignorant person, unable to write, as she signed her deposition with a cross; and her statements of time were quite inconsistent with her account of the difference between her brother's age and her own. She speaks of herself as being about ten years old when the child of Valentin by Jeanne Icard was born, which, if true, would make her sixty-five at the time of giving her testimony, instead of sixty, as she supposes. It is evident that no confidence can be given to these

Caujolle v. Ferrié.

statements, as to the age of Valentin, and they cannot, in my opinion, be considered as impairing at all the authenticity of the statement in that respect, in the entry of the publication of bans.

Recurring, then, to the condition of things existing at the time of the publication of the bans, what conclusion ought to be drawn from the cancellation of the entry in the official register? The law, it has been shown, provides that where objections are made, they are to be noted in the registry of publications, and to be summarily tried and adjudicated, and the judgment noted in the margin of the entry of the opposition. The argument on behalf of the respondent is, substantially, that the cancellation of the record should not be regarded, because no opposition is noted in the register, and there is no mention of the judgment in the margin. But it must be remembered that the father of Valentin had an absolute right to forbid his marriage until the latter should arrive of age, and that he was opposed to it to such a degree that he turned his son out of doors for persisting in it. He had only to signify his opposition to the proper officer, to render it impossible for the marriage to go on. In such a case it would be unlikely that the forms should be followed out. They were provided for cases in which there should be something to try, and where the parties on both sides should persist in litigating the point. In this case there could be no contest, for the facts were notorious and indisputable, and the right of the father to forbid the marriage was perfect. The natural and probable course in such a case would be for the son, on being notified that the father had taken the legal steps to oppose the marriage, to stop short in his proceeding. The law made it necessary that the act of opposition should be signified at the domicile of the parties to the marriage. Hence, Ferrié would regularly be served with the proper document. We find that the person in charge of the archives of the municipality not only canceled the entry of publication by drawing lines across it, but wrote in the margin the word "*neant*," which imported, in that position, that the record had become futile and void—literally, that

Caujolle v. Ferrié.

it amounted to nothing. It seems to me to be precisely such a disposition of the original entry as would be likely to be made if Ferrié had yielded without litigation to the opposition interposed by his father, which he found it impossible to resist, and had so informed the official person entrusted with the records. There is no ground for suspicion upon the evidence that the cancelation was officiously made by any person other than the keeper of the records. They are found in proper custody, and the lines and marginal entry are apparently of the same period as the act which they are intended to cancel. In addition to this evidence that the attempt to marry according to the forms of the law of 1792 was abandoned, there is the absence of any record of the act of marriage. This document, as has been shown, was required to be inscribed upon duplicate registers, one of which was to be preserved in the archives of the municipality, which are kept at the *maison commune*. The mayor of St. Girons certifies that the civil acts of marriage, celebrated in that commune, exist in the archives of the city from the year 7 of the Republican era (which ended the 22d September, 1798), down to our own times, and that there is no entry among them of a marriage between Valentin Ferrié and Jeanne Icard. There has been, I think, since 1792, some change in the French local territorial divisions; but it appears that in 1855, when the commission in this case was executed, records of the civil acts of marriage of the commune and of the arrondissement of St. Girons were deposited among the archives of the tribunal of Première Instance of the arrondissement; but it also appears that these records do not extend further back than 1st Vendémiaire of the year 11 of the Republic, corresponding with September 22, 1802, and that no record of the marriage in question is contained in them. There does not appear to be any public office besides this where the other duplicate register would be properly deposited. However this may be, when it is shown that the register preserved in the mayoralty of the commune, which was the primary place of deposit, for the proper year, does not contain any record of the asserted marriage, it cannot

Canjolle v. Ferrié.

be necessary to seek for the other duplicate original; for that one, if correct, would, of course, be identical with the one so preserved. The evidence of the destruction of certain records by fire, in the year 7, is of no materiality upon this point of the case, as that year ended in September, 1799, and there is no pretense of a marriage anterior to the publication of bans in May, 1800. That proof seems to have been given to account for the absence of the record of the birth of Valentin.

Thus far, the evidence shows an attempt by the parents of the respondent, a few weeks before his birth, to effect a marriage according to the forms of the written law of the country, and that that effort was abandoned by the cancellation of the initiatory document, the act of publication. That no marriage took place, according to these forms, is conclusively shown by the absence of any entry of the act of marriage in the register, which would regularly have contained it, if it had ever taken place. The parties continued to reside at St. Girons until after the birth of the respondent, and the law required the act of marriage to be recorded at the *maison commune* of the residence of one of the parties. The appellant has, however, shown, in addition, the absence of any record of their marriage in the several communes in which Jeanne Icard was known to have previously resided.

In a research of this character, contemporaneous written documents afford a degree of satisfaction beyond any other species of evidence; and, accordingly, the parties have, with great propriety, introduced the record of the baptism of the respondent from the baptismal record of the parish church of St. Girons, signed by the curé. It states that he was born and baptized the 30th June, 1800. His name is given as Balthazar Pierre Ferrié, "son of Valentin and Jeanne Icard;" the godfather, as is stated in the paper, was Balthazar Ferrié, and the godmother Rose Ferrié. The first question which arises upon this paper is, whether the presentation of the child for baptism, and the administration of that rite, of themselves furnish any evidence in favor of legitimacy. If none but legitimate children were admitted to baptism in Catholic countries, or if it

Canjolle v. Ferrié.

was unusual to baptize children born out of wedlock, there would be a presumption in favor of the respondent. But this is not the case. Baptism being the initiatory rite required for admission into the church, and considered generally necessary to salvation, is administered to all infant children, the offspring of Catholic parents, without regard to the social condition or legal *status* of the latter or their own. This is matter of general intelligence, and it is confirmed by the evidence of a French Catholic priest, from which it appears that illegitimate and legitimate children are indiscriminately presented for baptism. The other inquiry is, whether the argument in favor of legitimacy is supported by anything contained in the record of baptism. There is a suggestion that the statement that the respondent is the son of Ferrié and Jeanne implies that he was legitimate, because a child born out of wedlock is *filiius nullius*, and could not properly be called the son of any one. This, it is true, is a maxim of the English common law, but it was not very likely to have been known to, or acted upon, by a priest of a provincial town in France. No doubt, the description of the child as the son of Valentin is satisfactory evidence of his natural filiation; but I think it does not, of itself, in the connection in which it is here found, prove anything more. But there is the absence of any statement that the child was legitimate; and the mother is not described as the wife of Valentin. The child is simply mentioned as the son of Valentin [Ferrié] and Jeanne Icard. There is not much direct evidence as to whether it is usual for the record to refer to the *status* of the baptized child. The French priest before mentioned, who had officiated five years in Brittany, says his practice was to describe their condition as legitimate or illegitimate, according to the fact, where it was known. In the records of baptism incidentally given in evidence for other purposes, it is invariably stated that the child was legitimate. Thus, in the baptismal record of the intestate, Jeanne Icard, in 1777, she is described as the *legitimate* daughter of Jean Icard and Magdalen Riviere; and her brother Alexis was christened as the *legitimate* son of the same father and of Magdalen Riviere *his spouse*, and her half-

brother Benoit as the son of Magdalen Riviere *married* to Antoine Dezeille. The same practice seems to have prevailed in the records of marriages. In that of the parents of this intestate, in 1774, the married parties are each described as the *legitimate* children of their respective parents; and in the betrothal and the contract of marriage of the intestate and Du Lux, at the French consulate in New York, in 1812, the legitimacy of both the married parties is stated. I have not thought it proper to consider the evidence upon this point contained in the additional testimony produced by the appellant to the Supreme Court, while this case was pending there upon appeal; being of opinion that it can only be reviewed upon the proofs which were before the Surrogate. But, upon the regular proofs it appears that the practice, to say the least, was quite common to insert the fact of legitimacy in such entries when it could be done consistently with the truth. In such documents prepared here, and relating to citizens of this country, a direct statement that the child was legitimate would not be usual, though, if the parents were named, the mother would naturally be described as the wife of the other parent. In this case, the statement that the baptized child was the son of Valentin Ferrié and of Jeanne Icard, without adding, his wife, does not convey the idea of the marriage of the parents or the legitimacy of the offspring, if it does not suggest the contrary inference. I do not attach any importance to the use of the maiden name of the mother, for I understand that to be a common usage in France. But the absence of any statement showing that the parents were married to each other affords, in connection with the usage which has been mentioned, some evidence that they did not pretend to have entered into that relation. And this presumption acquires additional force from the consideration of the other circumstances of the case. If these persons were ever married, it was within two months of the birth of their child and of this baptismal ceremony. During the greater part of the period of gestation, their connection had been notoriously illicit, and on the 4th of May they were confessedly unmarried. That they desired that their child,

Canjolle v. Ferrié.

when born, should possess the *status* of legitimacy, is evident from the publication of the bans. If that act had been followed up by marriage before the birth of their offspring, it could scarcely fail to be known to the priest of the parish; and, if known, it is not easy to conceive a reason why the usual form of such instruments was departed from, when the effect of the change would be to conceal or render doubtful a fact well known to all connected with the ceremony, and the perpetuation of which would be of importance to the character of the family and the interests of the child.

But the godfather and godmother were Balthazar Ferrié and Rose Ferrié. The testimony does not afford any clue to the last named of these persons, except that her name indicates that she was probably related to the father of the child. But the christian name of the father of Valentin was Balthazar; and if he was the person who stood up as godfather, it would lead to an inference of some strength that he had waived his objections to a union between his son and the mother of the respondent, and something of what has been said would be inapplicable. It would not by any means be conclusive upon the point, for the father of Valentin might be willing to assume the imperfect obligation of a sponsor to his son's illegitimate offspring, when he would not be willing to see the son united in marriage to its mother. Still, it would be a circumstance of some weight; and it is, therefore, an important inquiry whether it was the grandfather or some other Balthazar Ferrié who stood up as godfather at the baptism of the respondent. The Surrogate inclines to the opinion that it was the grandfather, and says that the fact, if true, would prove not only his consent to the marriage, but the legitimacy of the child. The respondent's counsel have not insisted on that view, and it is not sustained by the evidence. It was shown that there was another Balthazar Ferrié of St. Giron, a relative of Valentin, who was of a suitable age to have been the godfather. One Victor Ferrié, of St. Giron, a tanner, 42 years of age in 1855, testified that his father and the father of J. P. Ferrié, the respondent, were own cousins, and that, when the respondent was at

St. Girons, in 1821, he went to learn the tanner's trade with the witness's said father. Thus far, his first name is not given; but we learn from the witness Vidal, who was sixteen or eighteen years old when the respondent was at St. Girons, in 1821, and who was, as he says, his intimate friend, that the name of the person with whom he went to learn the tannery business was Balthazar Ferrié. One who, in 1821, had a son eighteen, or even sixteen, years old, had at least arrived at years of understanding in 1800, and might well enough be received as godfather of the child of his cousin, who was of about the same age. J. P. Daffis also swears that the respondent lived at Balthazar Ferrié's; and I understand this to refer to the same period spoken of by Vidal, namely, in 1821. Daffis also says, in another connection, that there was a Balthazar Ferrié then (at the time of giving his testimony) at St. Girons, who was the godfather of the respondent. The respondent's grandfather died in 1822, so that he could not possibly be the one referred to by Daffis. This question is a little complicated by the fact that there was yet another Balthazar Ferrié, who was called as a witness. He was a cousin-german of the respondent, and was born in 1809. He could not be the person referred to by Daffis as the godfather, for he was not born until long after the baptism. Neither could he be the person with whom the respondent went to learn the tanner's trade in 1821; for he was then only twelve years old. Besides, he was not a tanner, but a merchant and manufacturer, and he was an own cousin of the respondent; whereas the one with whom he served as apprentice at the tannery business was his second cousin—their fathers being first cousins. In the testimony which the respondent gave on his own behalf, he swore that his godfather was his father's brother. He, of course, referred to what he had understood; but it was, no doubt, a mistake, for his father does not appear to have had a brother of that name. The records at St. Girons had not been found when he was examined, and he was not subsequently recalled. The only material influence of his testimony, on this point, is to show that he had never heard that his grandfather was his sponsor

Canjolle v. Ferrié.

at his baptism. It appears to me to be the certain result of the evidence upon this point, that it was not the father of Valentin, but a collateral relative, whose name is mentioned in the baptismal record.

The fact that the respondent was baptized in the name of his father, and that he ever after retained that name, has been very properly adverted to; and it would not be without its influence in a case otherwise doubtful. But it does not furnish a very cogent argument in his favor, under the actual circumstances. An illegitimate child is not entitled to the name of either of his parents; and yet he must be furnished with a name by which he may be known. If the natural father is not known, or will not acknowledge his offspring, the mother's name is generally employed, as it is always certain that the child descended from her, though the father should be uncertain. But where the father acknowledges the paternity, as was the case here, and the fact is otherwise notorious, I suppose it would ordinarily happen that the child would be called by his name, though it were known that he was not married to the mother.

These considerations have led me to the conclusion that no inference favorable to legitimacy can be predicated of the record of baptism. I think, on the contrary, that the mention of the names of the parents, without any hint that they were husband and wife, and the absence of any other language qualifying the respondent as legitimate, when the marriage, if there had been one, was so recent, and its existence was so important to remove from the parties the stain of a disreputable connection and confer an honorable *status* upon the child, and when the document is one in which it was usual to affirm legitimacy where it existed, go far to disprove the position which the respondent seeks to establish. The just conclusion, it seems to me, from these two pieces of written evidence, which are coeval with the transactions to which they relate and have come down to us through a period of sixty years, is, that these parties, shortly before the birth of their child, sought to be married according to the laws of the country, but were pre-

vented from doing so by their inability to obtain the consent of the father of the proposed husband, without which they could not lawfully be married; that the proceedings instituted for that purpose then fell to the ground; and the child was born of parents who had never been united in wedlock.

But, strong as these inferences seem to be, they are not absolutely conclusive. A marriage may by possibility have taken place; and acts of recognition by the parties, matrimonial cohabitation, and general reputation, are always received upon the question of marriage, where positive proof is unattainable. There are strong cases where alleged marriages have been established upon such evidence, where the direct testimony tended somewhat towards a different conclusion. (*Starr v. Peck*, 1 Hill, 270; *Piers v. Piers*, H. L. Cas., 331.) It is urged, on behalf of the respondent, that evidence of that character exists in this case, sufficiently persuasive to overcome any doubt which may be supposed to arise upon the more direct testimony. This renders it necessary to examine the conduct of these parents towards each other and towards their child, from its birth to the death of the mother, and to inquire as to the reputation which obtained in the localities where they were known on the question as to their marriage and their child's legitimacy. The outline of their history shows that the respondent was put to nurse by his mother immediately after his birth, and was afterwards neglected by both parents until he was about fifteen years old, when he was sought out and reclaimed by the mother, who afterwards exercised a kind of oversight respecting him, in France, until, at the age of about twenty-four, he was sent to this country, whither his mother had removed several years before; and that from thence, until her death, an intercourse and correspondence existed between them, sometimes of a kindly and sometimes of a hostile character. Soon after she reclaimed him, in 1815, and ever afterwards she gave out that he was her nephew, and never publicly owned him as her son, though she several times privately admitted to different individuals that she was his mother. As the counsel for the respective

Caujolle v. Ferrié.

parties deduce very different inferences from the testimony, it will become necessary to examine portions of it more particularly. I will first consider that which is connected in time with the respondent's birth, and embraces the period shortly before and shortly after that event. The point to be determined is, whether the respondent's parents were reputed to be married, or conducted themselves as though they were. The space of time occurring before the marriage to which the inquiry relates is, of course, very brief, it being entirely clear that the commencement of their intercourse was illicit, and that they were not married as late as the 4th day of May, 1800, when the act of publication of bans was entered upon the municipal records of St. Girons. Prior to that time, there could not well be, and there was not, in fact, any reputation that they were married. If there had been, we know it would be contrary to the fact. To render the respondent legitimate, the marriage must have taken place between that time and his birth, on the 30th day of June following. I have already sufficiently spoken of the effect of the written documents, and am now to examine the parol evidence. The testimony was taken in 1855, and the difficulty attending such an inquiry, more than half a century after the period to which it relates, is painfully apparent. The course adopted to obtain the testimony was certainly the best which could have been pursued. Two intelligent members of our bar, acquainted with the French language, and invested with the quality of commissioners, were sent to the locality, with instructions to examine all persons who could be found who should be likely to possess information upon the point in dispute. I infer from what passed on the argument that one of them was interested professionally for each of the litigant parties; and such an arrangement was well calculated to promote a searching investigation upon the contested questions involved. As might be expected from an inquiry conducted without a prior acquaintance with the facts, a large portion of the testimony is wholly unimportant. I lay out of view what has been sworn to by the witnesses at Massat and Biert, who only knew the intestate prior

Caujolle v. Ferrié.

to the time she went into the service of M. Anére at St. Giron, about the year 1798. Among those who resided and were examined at St. Giron, there were only two who were of sufficient age in 1800 to know anything of the relation between Valentin Ferrié and the deceased. One of them, Jean Paul Daffis, an ex-officer of the army of the first Empire and a Chevalier of the Legion of Honor, was seventy years of age when examined, and was consequently about fifteen at the time of the birth of the respondent. He swears that he knew Jeanne Icard at the time she lived, as a servant, at Anére's, whose house was just opposite the house of the witness; that he likewise knew Valentin Ferrié, who, he says, was his associate, they both being tanners; and he continued to be acquainted with him until he left St. Giron for Spain some years afterwards. He further says that Jeanne had a child by Valentin, which was born and baptized at St. Giron; that before its birth he kept company with her, and that the father of Valentin said she was Valentin's *bonne amie*, and that the latter stole leather from him, the father, to get money to give to Jeanne; that the father was very much opposed to a marriage between them, because she was only a servant and his family was in a comfortable position; that, when Jeanne was about to be delivered, she left Anére's for another house next door, to lay in, as he understood; and the next day he inquired, and was told she had become the mother of a boy. As to the question of marriage and legitimacy he says, "I do not know whether there was any reputation of the marriage of his parents." "I don't know whether the child was legitimate or illegitimate. The general report was, 'twas a natural child. The father of the child never spoke to me of his relations towards the child. He never told me that he was married to Jeanne Icard, or that he was not married to her. He never said anything to me about it." The other witness who was contemporary with the residence of the deceased at St. Giron is Margot Labat de Galai, an unmarried woman of about eighty, who seems always to have lived at St. Giron. She says she knew Jeanne Icard when she lived at Anére's as a servant, and was present at her

Caujolle v. Ferrié.

accouchement, arriving just after the birth of the child, and that she was her intimate friend. She also knew Valentin; and upon the question of their marriage she says: "I don't know if he was married to Jeanne Icard. I don't know that he cohabited with her as husband. Valentin lived with her some time before and some time after the accouchement. They lived together as if they were husband and wife. I don't recollect precisely, but it was over two months." "I understood that they [Jeanne and Valentin] wished to be married. Whether they were married or not, I do not know. He (the child) only passed as her son at St. Girons." "The child of Jeanne Icard, I don't know if it was legitimate or not. I don't know if they passed as husband and wife, or as lovers. *I never heard of a marriage existing between them.*" She proves that the accouchement took place at the house of M. Benóz, at St. Girons, "at the entrance of the city;" that she went there to be confined. She declares that she has heard her called Madame Ferrié by the people of the quarter in which they lived, and by M. and Mme. Anére. She says she was employed by Mme. Anére to take things to Jeanne, and that her direction was to take them to Jeanne Icard.

There is another class of witnesses who saw the deceased, the respondent's mother, at St. Girons and the neighboring villages at a later period, whose testimony has some bearing upon the point of the reputation as to her marriage. In 1815, after she had lived in New York eight or nine years, and had been married to Du Lux, she made a voyage to France, sought out and found the respondent, where he was living with poor people in the lower Pyrenees mountains, claimed and took him to Bordeaux and placed him at school; but he ran away and went back to the mountains, taking St. Girons in the way. He was again reclaimed on her behalf through the instrumentality of persons employed by M. Cattelan, her agent at Bordeaux, and this time was placed at St. Girons with M. Anére, the same person with whom she had lived, as a servant, fifteen or sixteen years before. There he remained until April, 1821, when he went to Bordeaux, and was under the charge of Cattelan. The

Canjolle v. Ferrié.

latter part of the time he was at St. Girons he served as a tanner's apprentice with a kinsman of his own family name, as has been already mentioned, in connection with the inquiry as to the identity of his godfather. In the course of the journey of Mme. Du Lux, in 1815, to find the respondent, she was at St. Girons, Massat and Biert, places where she had lived in her youth. The witnesses now to be spoken of, saw her during these visits. The time, it will be recollected, was about fifteen years after the alleged marriage and the birth of the respondent. It may be supposed that the character of her connection with Valentin Ferrié was still remembered, to some extent, at and in the vicinity where it took place. Marie Pages resides and was examined at Biert. She was born in 1787, and knew Jeanne when she lived at Biert, and heard of her return many years afterwards to look for her child. She had never heard of her marriage or of Ferrié; but she says it was public report, and known to everybody, that she had a bastard son. She admits that she knew it only by tradition, and had not heard of it until after she thus came back to look for her child. Gerons Victor Ferrié, of St. Girons, is a son of the Balthazar Ferrié with whom the respondent was put to learn tanning in 1821, the latter part of the time he lived at St. Girons. The witness was only eight years old at that time, but he says that the respondent was always regarded as illegitimate; but he admits that he had so heard principally since the death of his mother. J. M. R. Vidal, of St. Girons, born in 1805, swears he was an intimate friend of the respondent when he lived at Anére's, and while he was endeavoring to learn tanning with Balthazar Ferrié. He was asked, "Was this John P. Ferrié considered as legitimate or illegitimate by the people generally at that time?" and answered, "I have heard that he was a natural son of Jeanne Icard. I heard it from all the world (*de tout le monde*): it was the report at this place before he left for Bordeaux. I cannot remember any one who told me so." It detracts from the weight of this testimony that the witness thinks he remembers Jeanne Icard when she was a servant at Anére's, which was

Caujolle v. Ferrié.

before he was born. Pauline Bigourdan, of St. Giron, born in 1805, swore she was a niece of Anère, and frequented his house, and frequently saw the respondent when he lived there. On the point of marriage and legitimacy she says: "I don't know if she [Jeanne] was ever married with any one named Ferrié. I always heard the contrary." "I heard that the child was illegitimate. I heard it when she came to seek the child. I heard that this woman, who had been a servant here, had a child, and had come to take it away. I cannot remember any one who told me so. I have heard my uncle speak of the child as illegitimate. I have heard my aunt speak of the child as illegitimate." She further said, in answer to a direct question, that she had never heard any report of the child's legitimacy. Balthazar Ferrié, a son of Alexis, the brother of Valentin, and hence (naturally) the cousin-german of the respondent, was examined at St. Giron, where he lived, and said he was born in 1809. He was consequently about six years old when the respondent was placed at Anère's, and twelve when he left St. Giron in 1821. He swears he knew him during that period; that he was reputed to be the child of Valentin Ferrié and Jeanne, who had lived as a servant at Anère's, and to be illegitimate. Catharine Ferrié (widow of one Daffis), and an own sister of Valentin, lived and was examined at Castillon, a village in the neighborhood of St. Giron. She said she was sixty years old, and lived at St. Giron until the age of twenty, when she was married and went to live at Castillon. Taking her statement of her own age and of her marriage, and the statement of Valentin's age in the record of the bans, she was five years old at the respondent's birth, and was married about the time he was brought from the mountains to live at Anère's. It is impossible to say how far she means to speak from recollection and how far from hearsay. She says she is sure Valentin was never married at St. Giron; that he occupied a chamber with a girl called Jeanne, who had lived with M. Anère, and who was his *bonne amie*, and was recognized as such by his family, and was not his wife; that he wished to marry her, but their father and the family were opposed to it, and he left the house,

Caujolle v. Ferrié.

his father refusing to hold any relation with him, and forbidding the children to see him, because she was only a servant and they were in good circumstances; that he had a child by her, which died young, as she says she had heard. She said that her brother and Jeanne disappeared from St. Girons about the same time; she, however, leaving a few days before him. Her account, therefore, corresponds substantially with the other witnesses, except as to her belief that the child died, in which she was, of course, mistaken. Her disagreement with the other witnesses and with the known fact in this respect, impairing, as it does, in some degree, the confidence to be reposed in her testimony, shows, at the same time, that there could not have been a mutual understanding among the witnesses as to their testimony. Without confiding too much in the testimony of an uncultivated witness as to events which took place at a remote period, I still think that we may safely credit her statement as to the understanding in the family touching the connection existing between Valentin and Jeanne at the time of the birth of the child. Her mistake as to the early death of the child is the less remarkable when it is remembered that all the testimony shows that the respondent was taken from St. Girons into the country immediately after its birth, and was not seen again in that city until 1815, when the witness had removed to Castillon. Pierre Ribat, of St. Girons, was sixty years old when examined in 1855, and was consequently fourteen years younger than Valentin, whom, however, he says he knew well, and who, according to him, left St. Girons in 1809, to go to Spain; that he, the witness, parted with him at Bayonne in 1811, Valentin going to Spain, where, as reported, he afterwards died. He never heard that Valentin was married, and says he could not have been married at St. Girons, or he should have known it.

I have stated all the testimony upon which a recognition of the alleged marriage by the parties to it among their friends and acquaintances, or in the community in which they lived, or a reputation that they had become husband and wife, can be affirmed. If the appellants were obliged to overturn a

Caujolle v. Ferrié.

prima facie case of marriage established by the respondent, the evidence might not be considered conclusive; but if the *onus* is regarded as resting on the respondent, it cannot be said that it tends at all to establish the issue. Its tendency certainly is to show that the connection between the respondent's parents was not only illicit in its commencement and for a considerable period afterwards, as it is conceded to have been, but that it never became otherwise by the celebration of a marriage between them. If there was a marriage it is certainly remarkable that among so many persons who knew, or had heard of the illicit connection, and of the fruits of it, not one should ever have heard of a marriage. Margot Labat is not an exception to this remark. Her testimony is more favorable to the idea of a marriage than that of any other witness, because, if she is not mistaken, she heard Jeanne addressed or spoken of as Madame Ferrié, an appellation indicating that those who used it considered her his wife; and yet, though she was a companion and intimate friend of Jeanne of about the same age, was with her in her confinement, had known of the desire of Valentin and her to be married and had always lived at the same place, she never heard of a marriage existing between them.

I do not think there can be any just suspicion that the witnesses were in collusion with the French claimants of the succession or have a desire to favor them at the expense of the other party. The Caujolle's reside at Biert, are country people and apparently unknown to the witnesses residing at St. Girons and Castillon, while several of the latter belong to the family of Ferrié, and cannot be supposed to be unfriendly to one naturally descended from, if not legitimately connected with, that family.

The substance of the remaining testimony may be stated briefly. The respondent was sent into the country to be nursed, and Valentin and Jeanne soon after left St. Girons either together or separately; it is not certain nor very material which. There is a *hiatus* of three or four years in their history, or at least in that of Jeanne, at the end of which she is found residing at

Canjolle v. Ferrié.

Toulouse, and engaged in an amorous epistolary correspondence with Du Lux who lived at Bordeaux. The first of his letters is dated in May, 1804, and from that and subsequent ones it is apparent that their connection was of some standing. She was addressed as Mademoiselle Jeanne Icard, and although there are a good many of his letters to her preserved, there is no allusion in any of them to her connection with Ferrié, or to her being the mother of a child. As to Valentin it seems probable that he remained somewhat longer at St. Girons, but he eventually became connected with the French army in the Spanish Peninsula, and is supposed to have been assassinated by banditti in or after the year 1811. There is no vestige of any correspondence between Valentin and Jeanne after the birth of their child. It is probable that their connection continued a short time at St. Girons, as it is said that they visited their child together at its nurse's. There is no evidence that they ever saw, or took any interest in, each other after they thus separated. She never claimed him as her husband or spoke of him as such, and he was equally reserved as to any marital claim on her. There is no evidence of any disagreement or quarrel between them and no apparent reason for their separation, unless it be that they had no conjugal rights respecting each other. She and Du Lux lived together in a state of concubinage at Bordeaux, until they came to New York together, or nearly at the same time, in 1807. They continued to live together there in the same way until 1812, when, at the suggestion of a countryman, M. Deguerre, they were married civilly at the French consulate, and with the forms of religion in a Catholic church. By dealing in articles of millinery, she acquired considerable wealth. In the meantime the respondent, the fruit of the connection between the intestate and Valentin Ferrié at St. Girons, was lost sight of. He was transferred from one poor family to another in the mountains, where he was brought up in poverty and ignorance. No inquiries seem to have been made concerning him by either of his parents until 1812, when Du Lux made a voyage to France; apparently to make purchases in the line of their

Caujolle v. Ferrié.

business. He, however, seems to have been charged with the duty of endeavoring to find the respondent, who was called "Mrs. Du Lux's nephew," as is obvious from the letters he wrote to her during his absence. From these it appears that he wrote to Anére at St. Girons, who promised to make a thorough investigation as to the respondent. But it was without result, for Du Lux states in a letter to his wife, in which he mentions having engaged his passage for his return to the United States, that there was nothing positive to acquaint her with about the fate of her nephew. He went to France again in 1814, but there is no evidence that he prosecuted any further the effort to find the respondent. He never returned to America, a difference having arisen between him and his wife respecting some pecuniary matter; and he is supposed to have died many years ago.

The next year she went out to France, found her son in the mountains as has been mentioned, and brought him to Bordeaux, and, after he had escaped, caused measures to be taken, through M. Cattelan, as has also been mentioned, which resulted in his being placed with Anére, at St. Girons. A large number of letters from Cattelan, the draft of several from her to him, and one written by Anére to Cattelan, were given in evidence. In all of these, even in that of Anére, the respondent is spoken of as the nephew of the intestate, and the same is true as to the letters of Du Lux to his wife. While the respondent lived at Bordeaux, and after he came to the United States, and when living in Baltimore and at Cincinnati, the letters which passed between him and his mother, which, together, are numerous, refer to him as her nephew, and to her as his aunt; and when, on one occasion, a letter which was written to her in his name by one of his friends addressed her as his mother, she fell into a violent passion, which produced a humble apology from him. Whether Du Lux or Cattelan knew of the true relation between her and the respondent, is uncertain. Anére must, of course, have known it. The people at St. Girons appear to have recognized him as her illegitimate son. It is probable

Canjolle v. Ferrié.

that the respondent suspected, at least, the relationship to be different from that which she publicly gave out, for he swears that she claimed him as her son when she found him in the mountains; but in his petition to the Surrogate he speaks with some hesitation as to the nature of the consanguinity existing between them, for the statement is: "I am the sole heir-at-law of the said Jeanne Du Lux, and *believe* that I am the only child of said Jeanne Du Lux, and *know* that said Jeanne Du Lux has at times acknowledged me to be her only son, and has at other times addressed me and spoken of me as her nephew." It is enough for my purpose to show, as I have done, that she sought to impress upon the public and her acquaintances generally that their relationship was that of aunt and nephew. He was really her son according to the course of nature; but she virtually repudiated that relationship while she recognized him as a nephew—a position to which he had no right. This would be natural and consistent if the actual relationship was one which could not be creditably avowed, and if she desired, nevertheless, to account in some reasonable way for the care and patronage which she proposed to extend to him. Upon the supposition that he was legitimate, it is more difficult to account for her conduct in this respect. Several theories were suggested by the respondent's counsel, and, among others, that her separation from his father was the result of a quarrel, which had so embittered her against him that she would not own him as the father of their child. But there is no evidence of any such quarrel or of any disagreement, or that they separated for any other reason than that there was no legal tie to bind them together. Again, it was suggested, and the evidence affords countenance to the idea, that she did not consider his personal appearance to be such as to reflect credit upon her as his mother, and for that reason she disowned him as a son; but it clearly appears that the idea of treating him as a nephew and not as a son arose as early as 1812, when Du Lux went to France, and when she had not seen the respondent since his early infancy. Du Lux wrote to her in that year respecting his endeavors to find *her nephew*.

Canjolle v. Ferrié.

There are some minor circumstances, which may be disposed of in a few words. Her half-brother, Benoit Riviere, a lieutenant in the army, as late as March, 1801, wrote to her, using the address of La Citoyenne Jeanne Icard, at Anère's, St. Girons. This was eight or nine months after the birth of the respondent; but neither that letter nor one from Lieut. Riviere, without date, which evidently followed it in point of time, makes any allusion to her having been married. But it is probable he had not been informed of any of the circumstances of her connection with Valentin Ferrié. Frances Cazes, the mother of Valentin, died at St. Girons in January, 1816, and his father, Balthazar Ferrié, at the same place, in August, 1822. Both died intestate, and, in each case, legal proceedings were taken, of which the record remains, for dividing their respective estates among their heirs. Their heirs are named in the documents, and include the descendants of deceased children; and although the respondent was residing at St. Girons in 1816, and had just gone to live at Bordeaux in 1822, he is not mentioned in the papers relating to either of the successions. His connection with the Ferrié family, whose name he bore, was, no doubt, well known to his relatives at St. Girons; and the omission to notice him affords additional evidence that he was not acknowledged by them as legitimate.

It was argued, with great plausibility, by the counsel for the respondent, that the circumstances of the connection of the intestate with Du Lux in France, and their subsequent marriage in 1812, indicate that she must have been the wife of Valentin Ferrié, and thus disabled from marrying another until released by his death. Valentin is supposed to have died in 1811. The omission to marry at the commencement of the intercourse between her and Du Lux, the character of which was never equivocal, and the coincidence of their marriage so soon after the supposed obstacle to it was removed, do, at the first view, give some countenance to the conjecture. But M. Deguerre, who seems to be a respectable witness, testifies in substance that they were married in consequence of a suggestion from him that the manner in which they were

Canjolle v. Ferrié.

living together was not reputable according to the social ideas which prevailed here. Again, there is no evidence that she had ever been informed of the death of Valentin, or that she then had any connection or correspondence with any person at St. Girons through whom the information might have reached her, until after she was married to Du Lux. If we knew that she had been married to Valentin, and that she had heard of his death just before she married Du Lux, it would be fair to consider that she was influenced by the motives suggested; but in the absence of such preliminary knowledge, the argument is based upon a vague conjecture.

It would not be useful to go at any length over the evidence respecting the conduct of the intestate towards the respondent in this country for the last thirty years of her life. Her peculiarities of mind and character were so remarkable, that no safe inferences respecting the point in dispute can be drawn from what she said or did. To me it seems that the marks of affection which appear in some of her letters, contrasted as they are with the sentiments of dislike and even hatred which she exhibited towards him at other times, are quite consistent with the supposition that while she entertained the natural feelings of a mother, she felt an utter repugnance towards him as the result of a disgraceful connection with his father, of which his presence continually reminded her.

It has been argued that she has repeatedly affirmed that she had been married to his father, but that is a misapprehension of the evidence. The respondent, who was sworn on his own behalf, related conversations with the intestate in which it seems to have been assumed that he was her son, by a person named Ferrié, but she never told him he was her husband, or that they were married. He says he never asked her such a question. She told him however, she was glad he was dead and "that he was not much loss." But it is said she stated that she had been married to him to several of her acquaintances in New York; and Madame Du Fau, Madame Baurans, Mrs. Creighton, Madame Grieser and M. Deguerre are mentioned as the witnesses who prove it. To the first of these persons she admitted the respon-

Caujolle v. Ferrié.

dent to be her son, and said that his father was killed on the road from Toulouse to Spain. In answer to a precise question, the witness answers: "She did not say where she was married to the young man's father;" but it is not stated that she said she was married to him at all. To Madame Baurans she spoke of the respondent as her son; but the witness expressly says that she never said she was married. Her declarations to Madame Griesser came the nearest to supporting the allegation. She did say to this woman that she was married in France, when she was quite young, in revolutionary times, and that she had had a child in France also when she was quite young, but she did not say that the respondent was that child. On the contrary, she referred to him in the same conversation as her nephew, nor did she say that the child which she had, was the offspring of the husband whom she married, though it should perhaps be intended that such was her meaning. She declared to Mrs. Creighton that she had a son when she was fourteen or fifteen years old, but she did not say that she was married at that time, and she said the son was dead, and she did not give the witness to understand that she had ever been married to any other husband than Du Lux. To this witness she always spoke of the respondent as her nephew. To M. Deguerre she admitted, impliedly at least, that the respondent was her son, and said that his father had been killed by smugglers, but she did not say, and he did not ask her, whether she had been married to his father. He assumed, it is true, that she had been. She pretended to him that the reason why she did not acknowledge him as her son was that his mature appearance would make her look too old; but this was not a sincere statement, for the plan of calling him her nephew was conceived before Du Lux went to France in 1812, as is shown by his letters to her, and she had not then seen him since he had grown up. She passed him off to Deguerre, as he says, as only sixteen years old and sometimes said he was only fourteen, and yet he was about twenty-four when he came to this country. I do not think that any satisfactory conclusion can be predicated of her inconsistent and conflicting accounts respecting the respondent. She treated

him after he came here for the most part with great harshness and even cruelty, to the extent even of assaulting him in the street, but this arose from her savage temper, and does not raise any important inference upon the question of legitimacy.

My conclusions upon the whole case, are, *first*, that the documentary evidence shows that the process instituted by Valentin Ferrié to effect a marriage between himself and Jeanne Icard under the marriage law of 1792 was abandoned, either on account of the persistent opposition of his father, or for some other reason, and an entry in the nature of a *retraxit* made, which, whether technical or not, actually put an end to the proceeding before any marriage had taken place; *second*, that the absence of any entry of an act of marriage in the usual and legal repository of such transactions, and where marriages were at that period actually entered, and which remains and has been inspected, strongly confirms the conclusion deduced from the document first mentioned; *third*, that the ecclesiastical record of the birth and baptism of the respondent, preserved in the parish church, does not tend to show that he was born in wedlock; but, on the contrary, from its unusual omissions and peculiar language, it furnishes a strong inference against the allegation of a marriage between his parents; *fourth*, that the subsequent conduct of his parents and the history of the parties down to the death of the mother, do not furnish any presumption that he was legitimate, but tend strongly to a contrary conclusion. The material features of this last part of the case are, (1.) That the reputation among their friends and acquaintances, at the time of the respondent's birth, was that his parents were not married, and that he was a natural child; (2.) That when, fifteen years afterwards, he came to live among the relatives of his father and his friends and neighbors, the same reputation obtained, namely, that he was born out of wedlock; and when the death of the father and mother of his father entitled their descendants to a small inheritance, which was divided among them by the local tribunal, the respondent, though being on the spot, or where he could readily have been reached, was not recognized as a party interested in the succession, or

Caujolle v. Ferrié.

noticed in any way. These points are the more conclusive from the consideration that no person has been found who had ever heard any rumor of a marriage between the parents; (3.) That the parents separated, if not immediately, at least very soon, after the birth of the respondent and never lived together, or, so far as is known, ever saw each other afterwards. No disagreement is shown to have arisen between them, or any motive for the separation, unless it was that there was no conjugal tie to bind them together; (4.) That the respondent was wholly abandoned by both parents soon after his birth, and was brought up, in poverty and ignorance, by the charity of peasants, and his existence never recognized by his father, nor by his mother until he was twelve years old, and he was not reclaimed by her until two years later; (5.) That, although she admitted to some private friends that he was her son, she gave out publicly that he was only her nephew, and refused to allow him to call her mother, but compelled him to address her as his aunt; and that she never distinctly asserted, even to those to whom she confided the fact that he was her son, that she had been married to his father.

In my examination of the case I have treated it as one involving purely a question of fact, to be solved by the application of the ordinary legal rules of evidence. Thus viewed, it has seemed to me that there was no good reason to believe that the respondent was born in wedlock. I have only to add, that there are no artificial rules or presumptions of law applicable to the case which should prevent us from determining it according to the fact as, from the evidence, we believe it to be. There is, of course, no presumption of a marriage merely because its existence is asserted; but where a person is found to be the natural issue of a man and a woman, and nothing else is known respecting them, the presumption is in favor of legitimacy. This is part of the great rule which presumes a usual and ordinary state of things, rather than a peculiar and exceptional condition; which supposes legality rather than crime, and virtue and morality rather than the opposite qualities; which demands a construction of evidence,

Canjolle v. Ferrié.

as well as of written language, *ut res magis valeat quam pereat*. It is also true, that the amount of evidence to establish a given position is somewhat in proportion to the consequences which are likely to flow from a particular determination; for no tribunal, for instance, would pronounce a man guilty of a capital offence upon the mere preponderance of evidence which would be sufficient to charge him with a debt; and, in questions like the present, where a judgment in favor of one of the parties would attach the stigma of illegitimacy to another, the case against him must be of a very satisfactory character. But there is not, even in cases of acknowledged filiation, any uncontrollable presumption in favor of marriage or legitimacy. It depends upon the facts and circumstances of the particular case. There is one case where, for peculiar reasons, the presumption is very strong: Thus, every child born during wedlock, where there is no physical incompetency, is presumed to be legitimate; and this presumption prevails even where the parties are living apart by mutual consent. This was, at one time, considered a conclusive presumption, unless the husband was beyond sea at any time during the pregnancy of his wife; but the rule has been reconsidered, and it is now held that the presumption may be repelled by evidence of the strongest and most convincing kind, but not upon a mere balance of evidence. (*Morris v. Davies*, 8 Carr. & P., 217; *S. C.*, 5 Cl. & Finn., 163.) But that case is peculiar, and is founded mainly upon reasons of policy: hence the remarks of Lord LYNDHURST, in *Morris v. Davies*, in the House of Lords, quoted by the Surrogate, are inapplicable in a case like the present, in which the question is whether there was ever a marriage between the parents. Again, in *Piers v. Piers* (H. L. Cas., 331), the marriage was satisfactorily proved, and a long cohabitation had followed, the defect relied on being the absence of a license; and the existence of the paper was presumed, against circumstances of considerable weight against it.

The cases referred to by the learned Surrogate from the French courts, if apposite to the case, would not be useful as precedents for our decision, for it is perfectly established that, while

The People v. Zeyst.

the foreign law is resorted to in order to ascertain what facts are necessary to a legal marriage celebrated abroad, the evidence upon which the existence of these facts is to be ascertained and established, is to be determined by the law of the forum where the litigation takes place. In the cases from our own courts which have been referred to (*Fenton v. Reed*, 4 John., 52; *Starr v. Peck*, 1 Hill, 270), marriages were presumed upon slight evidence where there had been a long cohabitation between the parties, though there were some reasons for doubting whether an actual marriage had taken place.

I consider the present case as not affording such evidence as has ever been held sufficient to establish a marriage. I am, therefore, in favor of reversing the judgment appealed from and that of the Surrogate, and of remitting the proceedings through the Supreme Court to the Surrogate, to be proceeded in on the assumption that the respondent was not born in wedlock and consequently was not legitimate.

JAMES, J., delivered an opinion to the same effect, and COMSTOCK, Ch. J., concurred.

Judgment affirmed.

THE PEOPLE, *ex rel.* BURR, *v.* ZEYST

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The town clerk's minutes of the proceedings of a town meeting are conclusive. Parol evidence cannot be received to show that the next annual meeting was in fact appointed, by the majority of the voters, to be held at a different place than that stated in the minutes.

Though in actions to try the title to an office, parol evidence is, in general, admissible to impeach the certificate of the party holding it, an obstacle arising from the averments contained in a public record can, it seems, only be removed by a direct proceeding to correct the record.

APPEAL from the Supreme Court. Action in the nature of *quo warranto*, to determine the title of the defendant, Zeyst, to the office of supervisor of the town of Bleeker, in Fulton

The People v. Zeyst.

county. Upon the trial the plaintiff proved, by the minutes of the annual town meeting held in the town of Bleecker in 1859, that the house of S. S. Easton, in said town, was appointed as the place of holding the annual meeting for the ensuing year. A town meeting was held at that house on the 14th day of February, 1860, pursuant to such appointment, and the plaintiff, Burr, was then and there elected to the office of supervisor. If that election was valid, he was unquestionably entitled to the office; but it was claimed by the defendant that the minutes, so far as relates to the place fixed for holding the election, were false, and that the place actually appointed was the house of Michael Heinz, Jr., at which he was chosen to the same office. The defendant offered oral testimony to prove these facts, which was rejected, and the defendant took an exception. The plaintiffs had a verdict, subject to the opinion of the court, which, at general term, in the fourth district, rendered judgment in their favor; and the defendant appealed to this court. The case was submitted on printed arguments.

William Wait, for the appellant.

Charles G. Myers, Attorney-General, and *I. M. Dudley*, for the respondents.

LORT, J. The citizens of the several towns in this State, qualified by the Constitution to vote for elective officers, are by law directed annually to assemble and hold town meetings in their respective towns, at such place in each town as the electors thereof, at such meetings, shall, from time to time, appoint; and, when so assembled, are vested with the power to elect various town officers: to direct the raising of money for specified purposes: to make such prudential rules and regulations in relation to various subjects as they may deem proper; and with many other important powers. Certain officers of the town are required to attend and preside at every town meeting held therein, and the town clerk last before elected or

The People v. Zeyst.

appointed is required to act as clerk and keep faithful minutes of its proceedings, in which he shall enter at length every order or direction, and all rules and regulations made by such meeting; and, in case of his absence, another person is to be appointed to act as clerk by the electors present. These minutes must be subscribed by the presiding officers and clerk, and filed in the office of the town clerk within two days after the meeting. (1 R. S., p. 339, &c., §§ 1, 5, 6, 9, 11, 14, 15, 19.) It is also made the duty of the town clerk, to whom the custody of all the records, books and papers of the town is committed by law, to transcribe in the book of records of his town the minutes of the proceedings of every town meeting held therein, and to enter into such book every order or direction, and all rules and regulations made by such town meeting (1 R. S., p. 350, § 12); and it is declared that copies of all the papers duly filed in the office of the town clerk, and transcripts from the book of records, certified by him, shall be evidence in like manner as if the originals were produced. (*Id.*, § 16.)

It will be seen from the preceding statement that, while the electors of the several towns in this State have many legislative and other important powers conferred on them, special provision is carefully and sedulously made that faithful minutes in writing of all their acts and proceedings shall be kept by one of their own town officers, and officially authenticated, and then filed in the office of the town clerk and transcribed by him in the book of records of his town.

It is shown, in the case before us, that minutes of the acts and proceedings of the annual town meeting held in the town of Bleecker in 1859 were kept and authenticated in conformity with the provisions of law to which I have referred. They were, therefore, the best evidence of what was done at that meeting; and, if they are to control the rights of the parties, there is no doubt that the relator, Burr, was duly elected in 1860. The question then recurs, whether those minutes are conclusive on the subject. It is a well settled rule that, where the law requires the evidence of a transaction to be in writing, oral evidence cannot be substituted for that, so long as the

The People v. Zeyst.

writing exists and can be produced; and this rule applies as well to the transactions of public bodies and officers as to those of individuals. (1 Greenl. Ev., §§ 86, 470, 479-489, 493; Stark. Ev., part IV, p. 995, vol. III, Am. ed.; *Owings v. Speed*, 5 Wheat., 420; *Denning v. Roome*, 6 Wend., 651, &c.)

It is insisted, on the part of the defendant, that this rule does not apply to a proceeding instituted to test the title to an elective office. It is true that, in such a proceeding, it may be shown, by competent proof, that a person claiming an office under a certificate or declaration of election, although attested in due form of law, was not in fact elected. Such a certificate or declaration is not conclusive, and it may be conceded that the defendant had the right to show, as claimed by him, that the meeting at which Burr was elected was not held at the place where the electors at the previous town meeting had appointed it to be held; but that does not reach or affect the matter at issue in this case.

The question is, not as to the right to prove the fact itself, but as to the right to contradict by oral testimony the duly authenticated minutes of the town meeting as to that fact, and to show that the place so appointed was another and different place from that specified in those minutes.

No case authorizing such proof, or establishing a principle by which it is admissible, has been produced. A contrary doctrine was maintained by the Supreme Court of Massachusetts in the case of *Taylor v. Henry*. (2 Pick., 397.) There the title to the office of town clerk in a town in that State came in question. Taylor claimed to have been legally elected thereto, but Henry, the incumbent of the previous year, denied the validity of the election and refused to surrender the records, &c., appertaining to the office, and an application was then made for a mandamus to compel such delivery. It appeared, by extracts produced from the town records, that the election, under which he claimed, took place at an adjourned meeting held on the 2d day of March, 1824. The day appointed by law for holding the annual town meeting was the day previous, and it was in fact held at that time, and certain persons were

The People v. Zeyst.

then elected to office. There was no entry in the minutes of an adjournment to the day at which Taylor was chosen, or to any other time. Such an adjournment was deemed essential by the court to give validity to the relator's election; and they said: "We think that fact must appear by the records. The record of the meeting of the 2d March is merely that, at an adjourned meeting, &c., without saying of what meeting it was an adjournment. It might have been of a meeting in February or any other time."

It was then contended that parol evidence was admissible to establish the fact; but Chief Justice SHAW said: "We do not find a case which authorizes the opinion that an adjournment may be proved by parol evidence. It would be dangerous to admit such proof. Suppose a town to be very much divided. It might be hard to decide, without polling, whether a meeting was adjourned or not. We should have honest and intelligent men swearing to each side of the question. If a fact of that kind can be proved by parol evidence, it is difficult to see why the election of officers may not be proved in the same manner. This goes to the foundation of our system of civil society. We are obliged to come to the conclusion that there was no proof of a legal meeting on the second day, and that the petitioner is not town clerk."

In that case, it will be observed that it was held to be incompetent to supply an omission in the minutes. Much greater reason exists against the introduction of proof to contradict them.

Mr. Starkie, in his valuable Treatise on Evidence, says: "Where written instruments are appointed, either by the immediate authority of the law or by the compact of parties, to be the permanent repositories and testimony of truth, it is a matter both of principle and of policy to exclude any inferior evidence from being used either as a substitute for such instruments or to contradict or alter them: of principle, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than that which appertains to parol evidence: of policy, because it would be attended with great mischief and inconvenience, if those instruments

The People v. Zoyst.

upon which men's rights depend were liable to be impeached and controverted by loose collateral evidence." (Starkie, part IV, p. 995, vol. III, 3d Am. ed.)

The reason of the rule applies with great force in the case before us. The minutes of town meetings contain, as has been stated, such rules and regulations as may have been prescribed, and a statement of all acts done in exercise of the powers delegated to them. In some respects they are in the nature of legislative acts, and in others they partake of the character of legislative journals. They extend to all the citizens of the towns information in a certain and definite form, and which could not be attainable with any degree of certainty by any other means; and if their truth could be questioned in a proceeding based thereon, and especially by oral evidence, a principle would be sanctioned alike destructive of private rights and prejudicial to the public welfare. Those minutes are the only evidence accessible to the inhabitants generally of what was transacted at such meetings. Many of the electors in a town at the meeting held in one year, may not have been such at that in the year previous. Some may have removed into it from other towns, and others may have attained their majority within the year. They therefore could not be presumed to have had personal knowledge of the transactions at the previous town meeting; and it would be extremely unjust to deprive them of the rights and privileges which, according to the minutes of that meeting they were entitled to, by the uncertain recollection of bystanders. There would be no safety in the administration of public affairs, if such a rule were tolerated. If it should be held allowable to show that the place for the election, as designated in the town records, was incorrectly stated therein, it would be equally admissible to prove that the time for holding such meeting, as contained in the resolution of the board of supervisors, was incorrect. The time of holding an election is as material as the place. Indeed, I do not see where the limitation would be fixed. All acts of our legislature are required to be passed by a certain vote to give them validity; and if oral evidence can be given

The People v. Zeyst.

to show that the acts and proceedings of towns, of which minutes in writing are required to be kept, are not correctly stated therein, there is no reason, in principle, why the legislative journals and the laws themselves might not be questioned by proof of their inaccuracy.

These considerations lead us to the conclusion that the evidence offered and rejected in the case before us was properly rejected, and that the judgment of the Supreme Court should be affirmed.

DENIO, J. I am of opinion that the proceedings of a town meeting, duly recorded in the minutes directed by statute to be kept by the clerk, cannot be contradicted by parol evidence. The legislature has taken, as was fit, special care to have such transactions carefully entered and preserved. The town clerk "last before elected or appointed" is to keep a faithful minute of the proceedings, in which he is to enter at length every order or direction and all rules and regulations made by such meeting. (1 R. S., p. 342, § 14.) These minutes are to be subscribed by the clerk and by the presiding officers of the meeting, and are to be filed in the office of the town clerk within two days after the meeting. (Id., p. 343, § 19.) The fixing of the place at which the ensuing town meeting shall be held, is one of the matters committed to the determination of the meeting. (Id., p. 339, § 1.) In the present instance, the minutes, kept and signed as prescribed, designate the house of Eastman as the place for holding the then next annual town meeting; and the meeting at which the plaintiff, Burr, was elected was held at that place. The defendant was chosen at a meeting held on the same day at the house of Heinz, situated in another part of the town; and he offered to prove by parol that the vote of the meeting of the preceding year fixed upon that as the place for holding the meeting. Our laws respecting the local government of towns are derived in great measure from the practice in New England, and it seems to be held there that the minutes of a town meeting cannot be proved or contradicted by parol. In *Taylor v. Henry* (2 Pick., 397), the

The People v. Zeyst.

plaintiff's right to the judgment which he claimed depended upon his being the lawful town clerk of one of the towns in Massachusetts. He claimed to be elected at a town meeting held by adjournment on the second day of March. The legal day was the first day of March; but the meeting had power to adjourn to the next day. There was, however, no entry in the proceedings of the first of March of an adjournment. The court held that parol evidence could not be received to prove the fact of an adjournment. The Chief Justice (PARKER) said that it would be dangerous to admit such proof. "Suppose (said he) a town to be very much divided, it might be hard to decide without polling whether a meeting was adjourned or not, and we should have honest and intelligent men swearing to each side of the question. If a fact of this kind can be proved by parol evidence, it is difficult to say why an election of officers might not be proved in the same manner. This goes to the foundation of our system of civil society." There is a practice in Massachusetts of allowing the clerk to amend the record in order to supply defects even after a suit involving a question respecting them has been commenced. (*Hartwell v. The Inhabitants of Littleton*, 13 Pick., 229; *Welles v. Battelle*, 11 Mass., 477.) But there was no attempt to amend the records now in question. If parol evidence cannot be received to show proceedings to have taken place where the minutes are silent, for a stronger reason the effect of an entry actually contained in them cannot be changed.

It is argued that because the court can, in this class of actions, look behind the written evidence of title in order to see whether one claiming an office was lawfully chosen, the general rules of evidence may be dispensed with in relation to other matters connected with the election. But we think that is not a sound argument. One who is challenged for usurping an office is bound to show that he was lawfully chosen, and cannot altogether rely upon the official canvass or the certificate of election. The nature of the proceeding calls upon him to maintain the truth of what these papers state; but, in regard to preliminary and collateral matters, the ordinary rules of evidence prevail.

Cobb v. Harmon.

I am in favor of affirming the judgment of the Supreme Court.

SELDEN, J., was of the opinion that a party interested in removing an obstacle to the establishment of his title to an office, by averments contained in a public record contrary to the facts of the case, could proceed by mandamus to compel the correction of the record, which he supposed to be the view of the judges who delivered the preceding opinions; so understanding them, he agreed that the record could not be contradicted by parol in any other than a direct proceeding to conform its tenor to the actual facts. All the judges concurring,

Judgment affirmed.

COBB v. HARMON *et al.*

The sureties in a bond conditioned for the diligent prosecution of his application for a discharge by a debtor, under section 12 of the act to abolish imprisonment for debt and to punish fraudulent debtors (ch. 300 of 1831), are liable although such prosecution failed by reason of the inability of the County Judge, before whom it was to be had, to discharge his duties. In case of the disability of a County Judge, before whom such proceeding has been commenced, it may be continued before the nearest County Judge or Justice of the Supreme Court.

The death of the prosecuting creditor, after notice of the debtor's application for his discharge, does not abate the proceeding.

APPEAL from the Supreme Court. Action upon a bond executed by one Herrick and the other defendants as his sureties, conditioned that Herrick should, within thirty days from the date thereof, September 15, 1856, apply for an assignment of all his property, and for a discharge as provided in the 12th section of the act to abolish imprisonment for debt and to punish fraudulent debtors (ch. 300 of 1831), and should diligently prosecute the same until he obtained such discharge. The trial was before a referee, who found these facts: The

Cobb v. Harmon.

plaintiff's testator, having an unsatisfied judgment against Herrick, instituted proceedings before the County Judge of Ontario, which resulted in the judge's deciding that Herrick had unjustly refused to apply to the payment of such judgment property and rights in action, under his control. To avoid a commitment of Herrick, the defendants executed the bond above mentioned. More than fourteen days previous to October 11, 1856, Herrick verified his petition in due form before the County Judge, and served on the plaintiff a copy thereof with an account of his creditors, an inventory of his estate, and a notice that such petition would be presented to the County Judge of Ontario on the 11th day of October, 1856. On that day the parties with their counsel appeared at the office of the County Judge, and Herrick was ready to prosecute the proceedings upon his petition in good faith. The judge was not in the county but was absent, and in a state of physical and mental disability from intoxication, so as to be unfit to discharge the duties of his office. No justice of the Supreme Court then resided in Ontario county. The proceedings were not further prosecuted. The plaintiff's testator, who was the sole prosecuting creditor, died October 4, 1856, after the service upon him of Herrick's petition and notice, and before the time for prosecuting it had arrived. The defendants insisted that by his death all the proceedings abated, as well those on the original warrant, under which Herrick was brought before the County Judge for examination, as those on his petition for a discharge, which resulted from the decision made upon his examination. The referee reported in favor of the plaintiff, and the judgment thereupon entered having been affirmed at general term in the seventh district, the defendants appealed to this court. The cause was submitted upon printed arguments.

Smith & Lapham, for the appellants.

Woods & Murray, for the respondent.

LORT, J. If it be conceded that the performance of the condition of the defendants' bond became impossible by the

Cobb v. Harmon.

non-attendance of the County Judge at the time and place appointed for making the application therein mentioned, and thereby agreed to be made, they are nevertheless liable.

It is a settled rule of law that where a party by his own contract absolutely engages to do an act, or creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident or other contingency not foreseen by or within the control of the party, unless its performance is rendered impossible by the act of God, or of the law, or the obligee; but where the law creates a duty or charge and a party is disabled from performing it without any default in himself and has no remedy over, then the law will excuse him.

This principle is fully sustained by the leading case of *Paradine v. Jane* (Aleyn, 26), and also in our own courts by the cases of *Harmony v. Bingham* (2 Kern., 99); *Beebe v. Johnson* (19 Wend., 500); and *The People v. Bartlett* (3 Hill, 571, and the authorities therein cited).

The defendants, in the case under consideration, entered into the bond of their own volition, and as their voluntary act. The law did not impose any obligation on them to execute it.

It is true that it was entered into to relieve the defendant Herrick from the consequence of an adjudication made by the County Judge, before whom the proceeding under the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, had been instituted by Cobb, the obligee therein. That adjudication had declared him to be guilty of a refusal to apply property and rights of action which he had, to the payment of a judgment recovered by Cobb against him; and subjected him to imprisonment in consequence thereof. It then became the duty of the judge to commit him to the county jail, but he had the right to prevent such commitment by doing either of the following acts:

1st. By payment of the debt or demand claimed, with the costs of the suit, and of the proceedings against him.

2d. By giving security, satisfactory to the officer, that the debt or demand, with the said costs, should be paid within sixty days, with interest.

3d. By delivering to the officer an inventory of his estate and an account of his creditors, and executing an assignment of his property for the purpose specified in the act; and,

4th. By giving the bond now in question.

The proceeding was instituted for the enforcement of a private right by the judgment creditor, and resulted in securing to him a remedy which he did not previously possess.

It was optional with the debtor, thus proceeded against, to permit the creditor to pursue that remedy, or at his election to deprive him of it, by either of the modes above mentioned. He elected to give the bond in question, and the appellants, who had previously no connection or interest in the transaction, became his sureties. It was an act which they were under no legal duty to perform. They thereby voluntarily assumed an obligation which they bound themselves to the creditor to discharge, as a substitute for the remedy which, in consequence thereof, was taken away from him.

The engagement was absolute and unqualified, and has not been performed. The question is then presented, whether the non-performance is excused. It is conceded that at the time of the execution of the bond, there was a County Judge residing in the county in which the defendant resided, and that his residence therein continued till after the expiration of the time within which the application referred to in the condition was to be made, and that such initiatory proceedings had been taken and notice given as was requisite for making such application; but the County Judge, on the day designated for that purpose as stated in the finding of the referee, "was not in the county but was absent, and in fact in a state of physical and mental incapacity, so as to be unfit to discharge the duties of his office."

The application consequently could not be made to him at that time, and the result was, that it was never made. Do these facts constitute a legal excuse? They certainly do not bring the case within the exceptions above stated. The non-performance was not caused by the act of God, nor of the law, nor of the obligee. It was attributable solely to the default of

Cobb v. Harmon.

the judge, resulting from acts within his own control. His absence was voluntary, and his inability or unfitness to discharge the duties of his office, was in consequence of the free indulgence of a depraved appetite. All was the result of his own agency, and although the defendants themselves had done nothing to contribute to that result, and may not have been able in fact to prevent it, they nevertheless, by obligating themselves absolutely that the application should be made, became bound, not only that the petition and notices necessary to that end should be served, but also that the requisite means to make those steps effectual should be secured through the officer of the law appointed for that purpose. As a part of those means they undertook to secure the attendance of the judge, and so far to rule and govern him as that he should not by his own acts and conduct disqualify himself from the discharge of his official duty. Their obligation was in this respect the same in principle as that assumed by a party for the faithful discharge of an official or other duty by a third party, and the performance thereof was no more impossible. It is said by BRIAN, Ch. J., that "there is a diversity where a condition becomes impossible by the act of God, as death, and where by a third person (or stranger), and where by the obligor, and where by the obligees; the first and last are sufficient excuses of forfeiture, but the second is not, for in such case the obligor has undertaken that he can rule and govern the stranger, and in the third case it is his own act." (Viner's Abt., tit. Conditions (G.), pl. 19, citing Br. Conditions, pl. 127.)

It was competent, as has already been stated, for Herrick in the proceeding against him in order to avoid his commitment to have given security to the satisfaction of the officer, before whom it was pending, that the debt or demand of the creditor, with his costs, should be paid within sixty days, with interest. Suppose the defendants, instead of giving the bond they did, had covenanted that such debt, or demand with the costs, should be paid by Herrick within the time specified, and that at the expiration thereof he had been unable to make such payment, would such inability operate as an excuse for the non-perform-

ance of the covenant? That would not be pretended; yet the compliance in the last case may have been more difficult and more impracticable than in the case under consideration. The County Judge might have been brought back to the county, and assuming that he was unfit to discharge the general duties of his office, it may not be unreasonable to presume, from the cause of such unfitness, that he might nevertheless have been able to adjourn the proceedings; indeed, his absence from the county, and his disability too, might possibly have been prevented by proper precautionary measures or otherwise. At all events, there is nothing to show that it was absolutely or physically impossible to have secured his attendance and action.

It has already been remarked that the bond in question was executed to relieve Herrick from commitment to prison, and that the creditor was thereby deprived of a valuable remedy then available to him, and which he did not previously possess; and I will here add, that the same law which authorized the execution of such bond for the attainment of the object, also provided that whenever it became forfeited by the non-performance of the condition thereof, the plaintiff should be entitled to recover thereon the amount due to him on the judgment in the original suit, instituted against the defendant giving such bond. (§ 18.)

Its effect was therefore, as stated by the referee, an agreement to pay the debt, with a provision that payment might be avoided or rather that the bond should be deemed satisfied, if the judgment debtor did certain things. He failed to do them. There was no contingency provided for, and although it is true that the obligors could not qualify their obligation, for the reason that it was prescribed by the law, yet they did the same thing in substance as if they had entered into any other absolute engagement without any qualification, because the execution of it in the form so prescribed was an act entirely voluntary on their part, and not in discharge of any legal duty or obligation imposed or charged on them. There is, therefore, no reason why the obligors should not be held liable to the same extent as if the bond had been made on terms and condi-

Cobb v. Harmon.

tions dictated by themselves, independent of any legal proceedings; and, under the rule of liability to which I have referred their bond must be deemed forfeited, and they have become chargeable with the legal consequences of such forfeiture.

In the case of *Harmony v. Bingham* (*supra*), it was held by this court that a party who failed to perform a contract for the transportation of merchandise from New York, and the delivery thereof at Independence, in Missouri, within twenty-six days, in consequence of a detention occasioned by an unusual freshet, which rendered a public canal, upon which the goods were intended to be transported a part of the distance, impassable, was nevertheless liable. The extent of the rule is there discussed, and the case of *Beebee v. Johnson* (*supra*) was cited with approbation. In that it was decided that the defendant, who had covenanted that he would perfect in England a patent right granted in this country, so as to ensure to the plaintiff the exclusive right of vending the article patented in the provinces of Upper and Lower Canada, was not excused from performance, although it appeared that the power of granting exclusive privileges of this kind appertained not to the mother country, but to the provinces, and that they were never granted, except to the subjects of Great Britain and residents of the provinces, and could not be granted to either the plaintiff or the defendant, as both were citizens of this country. Chief Justice NELSON, in giving the opinion of the court, says: "If the covenant be within the range of possibility, however absurd or improbable the idea of the execution of it may be, it will be upheld; as where one covenants, it shall rain to-morrow, or that the Pope shall be at Westminster on a certain day; to bring the case within the rule of dispensation it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable or out of the power of the obligor, it is not in law deemed impossible." He then said: "The fulfillment in this case cannot be considered an impossibility within the above exposition of the rule, because, for anything we know to the contrary, the exclusive right to make, use and vend the machine in the Canadas, might have been

secured in England by act of Parliament or otherwise; at least there is nothing in all this necessarily impossible."

There is no difference in principle between those cases and the one under consideration.

I have so far considered the case upon the assumption that the application before the County Judge was necessarily terminated by his failure to attend at the time and place designated for hearing it, and that the proceedings could not be continued before another officer; but such is not the fact. It is expressly provided, by section 51, of 2 Revised Statutes, page 284, under the title "general provisions concerning courts of record, and the powers and duties of certain judicial officers," that, "in case of the death, sickness, resignation, removal from office, *absence from the county of his residence or other disability* of any officer before whom any special proceedings authorized by any statute may have been commenced, and where no express provision is made by law for the continuance of such proceedings, the same may be continued by the successor in office of such officer, or by any other officer residing in the same county, who might have originally instituted such proceedings; or if there be no such officer in the same county, then by the nearest public officer in any other county who might have originally had jurisdiction of the subject matter of such proceedings, if such matter had occurred or existed in his own county." It is conceded that there was no other officer, residing in the same county in which the County Judge before whom these proceedings were instituted resided, who was competent to act; and there can consequently be no doubt (as there was sufficient time for that purpose left) that they might have been continued before the nearest County Judge or any other officer authorized to act in such case in any other county, unless an express provision was otherwise made by law for the continuance thereof.

It is insisted, on behalf of the appellants, that the act of 1831, above referred to, makes such provision by section 19. That section declares that the general provisions applicable to the proceedings under the several articles of the first title, of chap-

Cobb v. Harmon.

ter five, of the second part of the Revised Statutes, and which are contained in the seventh article of the said title, shall be deemed to apply to proceedings in said act directed, so far as the same are not inconsistent with the provisions of the said act itself, and it is said that a mode is provided by those provisions, to use the language of appellant's counsel, for "a continuance of the proceedings by the successor in office, or by any other officer *in the same county* who might have originally instituted such proceedings (§ 5), and if there be no competent officer in the same county, then any judge of the County Courts may attend and adjourn the proceedings to the next Court of Common Pleas, to be held in the same county, and the said court shall proceed therein." (§ 6.)

Assuming that those sections were, by the effect of said section 19, originally applicable to a case like this, they cannot apply now, for the reason, that by a change in the organization of the County Courts since the passage of those provisions and that act, there is, as is well said by the counsel, "but one judge of the County Courts in each county." There was consequently no competent officer or judge within the meaning of sections 5 and 6, by whom the proceedings could have been continued or adjourned, and as it is not claimed that any other special provision applicable to the case exists, it follows that the general statute above cited applies, and that the proceedings might have been continued under that. But a more decisive and effective reason, for holding that this statute does so apply, is that the sections 5 and 6 referred to do not contain such general provisions as are contemplated by said section 19. They relate only to specific proceedings commenced under the first, second, third, fourth and fifth articles of that title, and have no application to the sixth article nor to any other proceedings. The referees therefore correctly decided that the omission of Herrick to proceed under that statute was without legal excuse, and that there was a want of due diligence on his part.

The appellants' counsel has raised and discussed another point which remains to be noticed. It is that "the death of

Cobb v. Harmon.

Cobb, the sole prosecuting creditor, after the service on him of Herrick's petition and notice, and before the time of prosecuting it had arrived, abated not only the proceeding commenced by the service of Herrick's petition and notice, but also the proceeding which Cobb commenced against him by warrant, which was not then finally determined." That question has been so ably and well discussed by the referee, that it is deemed unnecessary to consider it at length. It is sufficient to say that the proceedings as commenced by warrant, were terminated by the adjudication made thereon by the judge, and the subsequent execution of the bond given by the defendants. From that time Herrick became the actor. The law gave him the right to make application for the relief contemplated by the petition and notice, and prescribed the mode in which it should be made. His action was entirely independent of and beyond the control of Cobb, until the appearance of the parties before the judge. His death certainly did not prevent the application; and that application, as has been shown by the referee, was not such a proceeding as could be abated by, or in consequence of, such death. It was in the nature of a provisional remedy *after* final judgment in a suit, and not a new suit. The authorities cited, to show that at common law, the death of a sole plaintiff *before* final judgment abated the suit, are inapplicable to such a proceeding.

The judgment must therefore be affirmed, with costs.

JAMES, J., concurred; COMSTOCK, Ch. J., DENIO and HOYT, Js., not agreeing that the bond was forfeited had there been a failure in the legal arrangements or officers necessary to enable the debtor to prosecute his application, were for affirmance on the ground secondly discussed by LOTT, J.; SELDEN and DAVIES, Js., dissented, and MASON, J., expressed no opinion.

Judgment affirmed.

Dickins v. The New York Central Railroad Company.

DICKINS v. THE NEW YORK CENTRAL RAILROAD COMPANY.

Where a husband brings an action as administrator of his wife, for the damages resulting from her death by the negligence of the defendant, he can recover only for the pecuniary injury sustained by her next of kin. The value of her services to him does not enter into the estimate of damages and evidence thereof is inadmissible.

APPEAL from the Supreme Court. Action under the statute by the administrator of Sarah Dickins, deceased, for the damages sustained by her next of kin from the causing of her death through the negligence of the defendant's servants. The complaint averred, that the plaintiff was the husband of Mrs. Dickins, and alleged damages from being deprived of her services and assistance in the management of his domestic affairs. It appeared upon the trial that the deceased left no children, father nor mother. Her next of kin were two brothers and a married sister. Evidence was received, under exception by the defendant, tending to prove that the services of the deceased in the superintendence and management of the dairy upon her husband's farm, on which there were thirty-seven cows, were quite valuable. The plaintiff had a verdict and judgment, which having been affirmed at general term in the sixth district, the defendant appealed to this court.

Sidney T. Fairchild, for the appellant.

Ira Harris, for the respondent.

DENIO, J. The only question which we have found it necessary to consider in this case, is whether the plaintiff was entitled to recover damages on account of the pecuniary injuries resulting to him from the death of his wife. This question was raised on the trial by the objection made to the evidence by which the nature of her services in the plaintiff's business was

Dickins v. The New York Central Railroad Company.

shown. The defendant's counsel objected to that evidence, but it was received by the judge, the question as to its competency being reserved for the time. At the close of the plaintiff's evidence the question was considered, and the judge decided, that the testimony was competent and admissible, and the defendant's counsel excepted to the ruling. The evidence thus received, showed that the plaintiff carried on a dairy farm, and that the deceased, his wife, had a charge of the business, and rendered services to him therein. This evidence was immaterial, unless the loss of service of the deceased was a proper element of damages, in case the plaintiff should recover. The jury would moreover naturally infer from the decision holding it to be competent, that the facts which should be disclosed, were proper to be taken into consideration in estimating the damages.

The section of the statute which relates to the subject declares, that the amount to be recovered in this class of actions shall be for the "exclusive benefit of the widow and next of kin" of the deceased; and that the jury "may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the deceased person." (Laws of 1849, p. 388, § 1.) It thus appears that the money to be recovered is not for the benefit of the estate generally, and that it does not become assets, to be administered according to the general law of distributions. And the ground upon which the damages are to be estimated, is not the detriment which the estate of the deceased has suffered from the wrongful act of the defendant, in causing his death, but the pecuniary loss which certain parties connected with him by the ties of marriage and consanguinity have sustained on that account. It is the pecuniary injury resulting to the wife and next of kin which is to be estimated; but the injury to the husband, when it is the wife whose death has been caused by the defendant's act, is not spoken of as a ground of damages. And the husband is not embraced within the description of next of kin of his wife. Husband and wife, as such, are not

Buffalo Savings Bank v. Newton.

of kin to each other in a legal sense, and the husband cannot take under a settlement limited to the next of kin of his wife. (*Watt v. Watt*, 3 Ves., Jr., 244, and note *a*, in Sumner's ed.; *Garrick v. Lord Camden*, 14 id., 372; 2 Kent's Com., 136, 5th ed.)

The action is a peculiar one, depending entirely upon the statute and it seems to us quite clear that a compensation for the husband's loss of service cannot be embraced in the damages. The judgment must therefore be reversed, and there must be a new trial.

MASON, J., dissented; COMSTOCK, Ch. J., and LOTT, J., did not sit in the case.

Judgment reversed, and new trial ordered.

THE BUFFALO SAVINGS BANK *v.* NEWTON *et al.*

An order setting aside a sale in a foreclosure suit, though made on a summary application in an action: assuming the validity of the judgment: final; and affecting a substantial right, is one resting in the discretion of the court below, and is not appealable to this court.

MOTION to dismiss an appeal. The action was brought in the Supreme Court to foreclose a mortgage executed by one Frederick Geib to the plaintiff, on which about \$480 was due at the time of the commencement of the action. The usual judgment of foreclosure and sale was obtained, which was placed in the hands of the sheriff of Erie county to be executed; and on the 28th June, 1860, he sold the premises at public sale, and the same were purchased by Stephen M. Newton, as the highest bidder, for \$658.95, and the sheriff executed to him a conveyance pursuant to the sale. A motion was made at special term, on behalf of two of the defendants, Philip A.

Buffalo Savings Bank v. Newton.

Smith and Benjamin H. Austin, Jr., to set aside the sale, which was opposed by Newton, the purchaser: but the court made an order that the sale be set aside and the biddings reopened; that the purchaser deliver the deeds to the sheriff, and that he destroy them and pay back the money received from the purchaser: and that the county clerk, in whose office the deeds were recorded, make a memorandum in the records, referring to the order. A resale was ordered; Smith and Austin were required to pay the costs of the motion, and to deposit \$200 as security that the lands should produce on the second sale as large a sum as they sold for on the first one. The order was affirmed at the general term, and then Newton appealed here from the order.

The affidavits on which the motion was made showed that Smith and Austin were respectively interested in the equity of redemption of the mortgaged premises, and that one of them, Smith, had, pending the advertisement, paid and taken from the plaintiff an assignment of the judgment of foreclosure and of the mortgage, intending to protect himself by becoming a purchaser at the sale; but that, from forgetfulness, he had neglected to attend on the day of sale, and that no person representing the owners of the equity of redemption had attended. It was further shown that the mortgaged premises were worth \$4,000.

W. Dorsheimer, for Smith and Austin, insisted that an appeal would not lie from an order of this character; and he referred to *Hazleton v. Wakeman* (3 How., 357), and *Wakeman v. Price* (3 Comst., 334).

William H. Greene, for the purchaser.

DENIO, J. The order was, no doubt, one made in the course of a summary application in an action after judgment; and its object was not to question or impeach the judgment, in the sense of the cases in which an appeal from certain orders has been denied for that reason. Indeed, the order assumed the validity of the judgment. Moreover, the order was final, within

Briggs v. Bergen.

the meaning of section 11 of the Code; and in one sense it affected a substantial right. Nevertheless, it was not an order from which an appeal will lie to this court. It rested purely in the discretion of the court to grant or refuse it. The point is entirely settled by the cases in this court referred to by the counsel for Smith and Austin. *Hazelton v. Wakeman*, was an appeal from an order granting a motion to open the biddings at a master's sale. The appeal was dismissed, on the ground that it would not lie from an order of that character. In *Wakeman v. Price*, the appeal was from an order vacating a receiver's sale of a large amount of real estate in the city of New York, which had been sold at prices far below its value. The purchaser appealed here, but the appeal was dismissed, with costs, on the ground that the granting of the order was a matter of favor, resting in the discretion of the court.

The present appeal must be dismissed.

All the judges concurring,

Appeal dismissed.

BRIGGS *et al.* v. BERGEN.

No appeal lies to this court from an order striking out an answer as sham or irrelevant.

A frivolous answer is not struck out but remains upon the record. Where, therefore, it was stated in the order appealed from, that the answer was stricken out as "sham, frivolous and false," the inference is that it must have been treated as sham, and not as frivolous.

MOTION to dismiss an appeal from an order made at general term in the Supreme Court, affirming an order made at special term, striking out an answer as sham, frivolous and false. Under which of these categories the answer was held to come in the court below, did not, it would seem, appear from the

Briggs v. Bergen.

papers used on the motion in this court, otherwise than by an inference from the terms of the order appealed from.

George Brown, for the motion.

Christopher French, opposed.

SELDEN, J. The practice in regard to frivolous answers, demurrers and replies is regulated by section 247 of the Code, which provides that the party aggrieved may apply, upon a notice of five days, to a judge out of court, for judgment, and that "judgment may be given accordingly." The frivolous pleading in such cases is not stricken out, but remains upon the record, and becomes a part of the judgment-roll. An appeal may be taken from the judgment in such cases, from the special to the general term, and from thence to the Court of Appeals. But the manner of dealing with sham and irrelevant answers is entirely different. Section 152 of the Code provides that "sham and irrelevant answers may be stricken out on motion, and upon such terms as the court may in their discretion impose." In these cases the obnoxious pleading is stricken out, and is no longer part of the record. The suit is left in the same condition as if no answer had been put in; and where the time for answering has expired, when the order to strike out is made, and no terms are imposed by the order, the plaintiff obtains judgment as for want of an answer. In such cases, no appeal will lie from the judgment, it having been obtained through the default of the defendant. An appeal, however, may be brought from the special to the general term from the order to strike out the answer, under subdivision 3 of section 349 of the Code, as the order clearly involves a substantial right. But there seems to be no provision for bringing such an order by appeal to this court. It is clearly not within the second or third subdivisions of section 11 of the Code, as it is not an order which determines the action, nor is it made in a summary proceeding after judgment. If it could come here at all, it must be under subdivision 1, upon the

White v. Anthony.

ground that the appeal, although in terms from the order, is virtually an appeal from the judgment. It may be said that the judgment, although in form a judgment by default, is, in reality, a judgment consequent upon the decision of the court upon the motion to strike out, and hence is appealable. But the order to strike out does not direct a judgment, nor does judgment follow necessarily upon it. The party may still answer, notwithstanding the order, if the time for answering has not expired, or he may apply for and obtain leave to answer, where it has. If he chooses to omit this, and to resort to his appeal to the general term, he must abide the consequences of his election. There is no mode, therefore, in which the question arising upon an answer alleged to be sham or irrelevant can be brought to this court. In the present case, although the terms of the order are, that the answer is stricken out as sham, frivolous and false, yet it could not, as we have seen, be stricken out as frivolous; and, hence, the inference is, that it must have been stricken out as sham.

It necessarily follows that no appeal will lie to this court; and the respondent's motion must therefore be granted, with \$10 costs.

Motion granted.

WHITE, Receiver, &c., v. ANTHONY.

Where an appeal is dismissed in this court with costs, general costs follow whether the appeal be from an order or a judgment. All appeals here stand on the same footing.

MOTION for the correction of the remittitur which had been sent down upon the decision in this case, which was similar to,

White v. Anthony.

and received the same disposition with, that in *Briggs v. Vandenburg* (22 N. Y., 467).

H. R. Mygatt, for motion.

G. F. Johnson, opposed.

BY THE COURT—*LOTT, J.* The appeal in this case, having been taken from an order of the Supreme Court, affecting a question of practice merely, was dismissed with costs at a previous term of this court, after the question involved had been submitted for decision on the merits, upon the ground that the order was not appealable. The remittitur has been sent down to the Supreme Court, and filed in the proper office. In that, it is stated to have been adjudged by this court that the appeal be "dismissed with costs."

A motion is now made that the remittitur be corrected, and that the amount of costs to be paid in this court be fixed therein, and that the same be chargeable only upon the fund represented by the plaintiff, "on the ground that the remittitur by mistake does not define the amount of costs to be paid, and omits to charge the same only upon the fund represented by the plaintiff."

It is conceded by the appellant that this court intended to allow the respondent his costs on the dismissal of the appeal; but it is insisted that the costs on a motion only, and not the general costs on an appeal, can be allowed, and that the amount of those costs should have been fixed and stated in the remittitur.

This view of the question is erroneous.

Appeals may be taken to this court from certain orders made by the Supreme Court, as well as from their judgments; and no distinction is made by the Code between the two classes of appeals in the allowance of costs. The provision regulating them is general. It allows "to either party, on appeal to the Court of Appeals, before argument, \$25, and for argument \$50." (§ 307, sub. 6.)

Bowers v. Tallmadge.

A different rule prevails in relation to appeals from orders at special term to the general term of the Supreme Court. An express exception to the allowance of general costs in such cases is made in subdivision 5 of the same section. It is thereby declared, that there shall be allowed to "either party, on appeal, except to the Court of Appeals, and *except in the cases mentioned in section 349,*" certain specified sums. Those cases are, appeals from a designated class of orders made at special term, or by a single judge of the same court, or by a county judge. This exception in relation to appeals in the Supreme Court, and the omission of it in this court, manifests an intention to place all appeals brought here on the same footing. At all events, no distinction is made between them. There is, therefore, no ground for the allegation of a mistake in the remittitur in respect to the direction as to costs.

The other branch of the application, which seeks that the costs be chargeable only upon the fund represented by the plaintiff, cannot be entertained. Assuming that the effect of the judgment, as contained in the remittitur, is to charge the costs on the appellant personally (but as to which we express no opinion), there is no allegation that the judgment is not in fact conformable to the decision actually made. That decision cannot be changed on this application.

The motion must, therefore, be denied.

BOWERS v. TALLMADGE.

Where the return to an appeal served on the respondent is imperfect, his remedy must be sought by a special motion to the court. Rule 7, which allows the entry of a common order dismissing the appeal, applies only where there is an entire omission to serve a copy of the return within the proper time.

MOTION to set aside an *ex parte* order dismissing an appeal. The appeal was taken April 12, 1860. Printed copies of the Case were served upon the respondent's attorney, May 18, 1860.

Bowers v. Tallmadge.

On the 28th May, 1860, the respondent's attorney served the notice under Rule 7, requiring service of a copy of the return. The defect in the Case, as it had been previously served, was the omission of copies of the opinions delivered in the court below, at the special and general terms. The appellant's attorney was ignorant that any written opinions had been delivered. Upon learning the fact that such opinions had been delivered, the appellant's attorney procured, printed and served copies of such opinions—having obtained an order allowing him additional time for that purpose. The respondent's attorney, conceiving that the Case could not be served in fragments, after waiting for the expiration of the time limited by the rule for serving copies of the Case, entered an *ex parte* order dismissing the appeal. The respondent moved to set aside this order.

Richard Goodman, for the motion.

Amasa J. Parker, opposed.

BY THE COURT. The motion must be granted. The practice is well settled that where an imperfect Case has been served and the respondent desires that it should be amended, he must apply to the court by motion upon notice. He is at liberty to dismiss the appeal by *ex parte* order, under Rule 7, only where there is a total failure to serve any Case within the time required.

END OF CASES DECIDED AT MARCH TERM.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

June Term, 1861.

IN THE MATTER OF THE ATTACHMENT AGAINST EDWARD AND
AUGUST BONNAFFE, Non-resident Debtors.

Under the proceedings against a non-resident debtor, all creditors at the time of issuing the first warrant of attachment against him, are entitled to come in and share in the distribution of his estate, whether they be residents or not residents of this State or the United States, and without regard to the place where the debt was contracted.

Such right is not divested by the creditor's being a party to a *concordat* or composition with creditors, made in France, where the debtor resided, and confirmed by its judicial tribunals, which provided that the debtor should be free in his person and his property.

Whatever may be the effect of such a *concordat* in respect to the future acquisitions of the debtor, it does not discharge the claim of any creditor to share in the existing property of the debtor.

It seems that proceedings under the French bankrupt system, never effect the absolute discharge of the debtor, but that its extent depends upon the interpretation of the composition between him and the creditors.
Per DAVIS, J.

ON the petition of Claudius Dord, a citizen of the State of New York, an attachment under part II chapter V, title I, article
SMITH.—VOL. IX. 22

Matter of Bonnaffé.

I of the Revised Statutes of this State (2 R. S., p. 8), was issued on the 10th of December, 1847, to the sheriff of New York, against Edward Bonnaffé and August Bonnaffé, non-resident debtors, composing the firm of Bonnaffé & Company, citizens and residents of, and doing business at Havre in France. Such proceedings were had thereon that trustees were appointed, who proceeded to collect and realize the assets of the non-resident debtors attached within this State; and in compliance with the requirements of the statute, the trustees gave notice requiring all the creditors of such debtors to deliver to them their respective accounts and demands. Such demands against the estate of the debtors were adjusted by the trustees.

In respect to certain French creditors, this state of facts was proved before the trustees: On the 30th of November, the Messrs. Bonnaffé were adjudged "*en faillite*" [declared bankrupt] by the Tribunal of Commerce in Havre, and provisional receivers [syndics] of their estate were appointed. The receivers proceeded to convert the assets of the Bonnaffés into cash, and soon learned from their agent in New York of the attachment issued in this State. In May, 1848, the receivers convened the creditors and made a report of their proceedings, which included a statement of the pendency of the proceedings on attachment in New York. The Bonnaffés made to the assembled creditors (fifty-two, a majority in number, and holders of more than three-fourths of the debts of the insolvents), a proposition "to be entirely acquitted and discharged by making surrender to them of their assets, as well in the States of America, and particularly in the United States of America and in *Mississippi* [*sic*], as in Continental France and its colonies, and other places whatsoever." The creditors present, with the approbation of the receivers and of the supervisory judge [*Juge Commissaire*], accepted the proposition, and the judge thereupon drew up an agreement in writing [*concordat*], which was signed by all the creditors present. Its terms are sufficiently stated in the following opinion. This *concordat* was confirmed by the Tribunal of Commerce of Havre, on the

Matter of Bonnaffé.

23d of May, 1848, and was declared obligatory upon all the creditors, subscribers or non-subscribers, as well as those whose claims had been proven and registered, as those whose claims had not been proven or registered.

Claims were presented to the trustees under the attachment, amounting to about \$876,000. Of these, \$478,000 was due to creditors in France, and on debts contracted there: \$158,000 was due to creditors residing in the United States, who had proved their debts under the proceedings in France, and had received dividends there: \$89,000 was due to creditors residing in the United States, who had not proved their debts or received any dividend in France, and \$61,000 was due to French creditors who had not proved their debts or received any dividend in France. The trustees decided that all the creditors, whether residing in this State or elsewhere, and whether or not they had made themselves parties to the proceedings in France, were entitled to prove their debts, and receive dividends, charging those who had received any payment from the assets of the Bonnaffés in France, with the sum so received as so much money paid to them on account of the dividends to be declared by the trustees, so that all the creditors who proved their debts should share equally in the entire estate and assets wheresoever administered. The trustees adjusted the debts and declared a dividend upon this basis.

The creditor taking out the attachment objected to such adjustment, upon two grounds: First. That the trustees erred in allowing the accounts and demands against the estates of the non-resident debtors, due and owing to, and held by creditors residing out of the State of New York. Second. That they also erred in allowing the accounts and demands of creditors, citizens and residents of the Kingdom of France, and of such American creditors as had proved their debts and received dividends under the proceedings in France.

On motion to the Supreme Court at special term, to correct the decisions of the trustees in these two particulars, their action was affirmed, and on appeal, at the general term the order of the special term was also affirmed. From this order, the

Matter of Bonnaffé.

executor of the creditor taking out the attachment, appealed to this court.

Stephen P. Nash, for the appellant.

Jeremiah Laroque, for the respondents.

DAVIES, J. But two questions are presented for our consideration on this appeal: I. Whether the creditors of the non-resident debtors residing out of the State of New York, are entitled to share or participate rateably with those creditors residing within this State, in the distribution of the fund in the hands of the trustees. II. Whether the creditors, citizens and residents of the Kingdom of France, who became parties to the proceedings had there on the failure of the non-resident debtors, or were bound by those proceedings, or who have participated in the dividends declared and paid under and in pursuance of them, have thereby forfeited or lost the right to participate or share in the funds held by the trustees in this State. It will be most convenient to consider these questions in the order they are presented.

The provisions of our statutes regulating the proceedings of the assignment of the estates of non-resident, absconding, insolvent or imprisoned debtors, are found in chapter V, title I, article I, part II, of the Revised Statutes (2 R. S., p. 3). Title I, is subdivided into eight articles. Article I treats of the attachment against absconding, concealed and non-resident debtors. Article II, of attachments against debtors confined for crimes. Article III, of voluntary assignments made pursuant to the application of an insolvent and his creditors. Article IV, of proceedings by creditors, to compel assignments by debtors, imprisoned on execution in civil causes. Article V, of voluntary assignments by an insolvent, for the purpose of exonerating his person from imprisonment. Article VI, of voluntary assignments by a debtor imprisoned in execution in civil causes. Article VII, general provisions applicable to proceedings under the several preceding articles, or some of them. And article VIII, of the powers, duties and obligations of trustees and assignees under this title.

Matter of Bonhaffé.

In proceedings under the first article, the application for the attachment can only be made by a creditor residing within this State, or by a creditor residing elsewhere, upon a contract made in this State, or upon a judgment rendered within this State, or upon a judgment rendered in another State upon a contract made in this State. (§§ 1 - 3, p. 8.) Such demand, if the application is made by one creditor, must amount to \$100 or upwards; if by two, to \$150 or upwards, and if by three to \$200 or upwards. (§ 3.) Section 37 (p. 8) provides, that after such application shall have been made, any other creditor, of such debtor, having a demand against such debtor, whatever may be its amount, may file with the officer who issued the attachment, an affidavit specifying the amount of such indebtedness, and a petition stating the desire of such creditor to be deemed an attaching creditor. And section 38 (p. 9) declares, that upon filing such affidavit and petition, such creditor shall in all respects be deemed to be an attaching creditor, and entitled to the same benefits and advantages, and subject to the same responsibilities and obligations as the creditor who originally procured the attachment. By section 54 (p. 11) it is provided, that every debtor against whom any warrant of attachment shall have been issued, may, at any time before the appointment of trustees as therein provided, apply to the officer issuing the warrant to discharge the same. And by section 55, as amended (p. 12), upon such application such debtor or his agent is required to execute, and deliver to the officer, a bond to the creditors prosecuting the attachment, in a penal sum double the amount of the debts sworn to by such creditors, with such sureties as shall be approved of by the officer, conditioned that they will pay to each attaching creditor the amount justly due and owing by such debtor to him, when he became an attaching creditor, on account of any debt so claimed and sworn to by him, with interest; and if given in a proceeding against a non-resident debtor, it shall also contain a condition, if anything was due to such creditor, the said debtor will pay to every such creditor the costs and disbursements incurred in obtaining such attachment and the proceedings thereon. Section 56 (p. 12)

Matter of Bonaffé.

provides, that upon such bond being executed and delivered, the said officer shall thereupon discharge such warrant of attachment.

From the preceding provisions it is apparent that the application for the warrant of attachment could only be made by a resident of this State, or by a non-resident having a demand which arose within this State. The first restriction has been enlarged by a subsequent section of article seventh of the same title (§ 9, 2 R. S., p. 36), which provides, that creditors residing out of this State and within the United States, may petition and unite in any petition, in the same manner as resident creditors, under either of the preceding articles. It is therefore incontrovertible, that the application for an attachment may be made by any creditor residing within the United States having a demand of the requisite amount. And the language of the statute is equally plain, that after the attachment has been issued, any other creditor, without any qualification as to residence or the amount of his demand, may come in and avail himself of the benefits of the attachment, and put himself in all respects in as favorable position as the original attaching creditor. We thus perceive that the legislature, for reasons doubtless entirely satisfactory, placed restrictions and qualifications upon those who might initiate within this State the proceedings against non-resident debtors. The restrictions imposed were that the attaching creditor should be a resident within the United States, and that the amount due by the debtor to the attaching creditor, or creditors unitedly, should be of the amount specified in the statute. But no such restriction as to residence, or limitation as to amount, is found in the provision permitting any other creditor of such debtor to come in and avail himself of the benefits of the attachment. The legislature have thrown the door as wide open as possible, by declaring that any other creditor, whatever may be the amount of his demand, may participate in the benefits of the attachment.

This view is, I, think, greatly strengthened by the other provisions of the statute. Section 58 (p. 12) declares, that if

Matter of Bonnaffé.

the debtor, against whom the attachment has been issued, shall not appear and satisfy his creditors (that is, those who may have made themselves parties to the proceedings against him), and if the warrant shall not have been discharged, the officer, at the expiration of three months from the time limited by the notice required to be given, shall nominate and appoint three trustees for all the creditors of such debtor. The powers, duties and obligations of the trustees are prescribed in article 8 of said title. (2 R. S., p. 39.) By subdivision 8, of section 7, they are to settle all matters and accounts between such debtor, and his debtors or creditors; and by section 8, immediately upon their appointment, they shall give notice thereof, and require (by sub. 8) all the creditors of such debtor to deliver their respective accounts and demands to the trustees, or one of them.

Section 19 provides, that if any controversy shall arise between the trustees or any other person in the settlement of any demands against such debtor, the same may be referred as therein provided. Section 27 declares, that within fifteen months from the time of their appointment, the trustees shall call a general meeting of the creditors of such debtor, and section 28 enacts that at such meeting, all accounts and demands, against the estate of the debtor, shall be fairly adjusted, and the amount of moneys in the hands of the trustees declared. Section 33 provides, that the trustees shall distribute the money in their hands, among all those who shall have exhibited their claims as creditors, and whose debts have been ascertained, *pro rata*; and the only qualification or restriction as to those to whom payment is thus to be made, is contained in subdivision 1 of this section, which declares that the payment or distribution is to be among those who were creditors at the time of issuing the first warrant of attachment.

By section 41, it is provided that any creditor who shall have neglected to deliver to the trustees an account of his demand, before the first, second, third or other dividend, and shall deliver it before the second or other dividend, shall receive the sum he would have been entitled to on any former dividend, before any distribution to other creditors.

Matter of Bonaffé.

This examination of the provisions of the statutes cannot fail to carry conviction to the mind, that if the legislature intended to exclude creditors residing without the United States, from participating in the distribution of the assets of their debtor seized by virtue of this act, they omitted to give expression to such intention. The language used conveys precisely and distinctly the opposite idea. We have already seen, that any creditor having a demand to any amount may come in and have the full benefit of the proceeding, in the same manner as if he had been originally the attaching creditor. The trustees, when appointed, are the trustees for all the creditors of the debtor. How can they be trustees for all, when we are asked to say that 'all' means only a certain class, and that class is to be determined by locality? In many instances, the exclusion of all creditors, who only were competent to initiate the attachment proceeding, would operate to the full payment of the attaching creditor, and the return to the debtor of perhaps, a large portion of his estate; and the great bulk of his creditors would have to stand idly by and witness the statute wrested to the perpetration of a great wrong. "All the creditors of such debtor" must be held to mean just what its language imports.

Again, the trustees are to settle all matters and accounts between such debtor and his creditors. Not, as it is argued, between the debtor and such of his creditors as reside within the United States. Such a settlement could not be of all matters and accounts between the debtor and his creditors. In many cases, upon this construction, it must necessarily be of a very small fraction.

The trustees are to require all the creditors of the debtor to deliver to them their respective accounts and demands against the debtor. It seems superfluous to argue that all the creditors does not mean all—every one, located anywhere, having a demand against the debtor. The statute says the trustees shall give the notice requiring all the creditors of the debtor to deliver to them their respective demands. The creditors, in compliance with this requirement of the trustees, deliver in their respective demands, and then the trustees, instead of doing

Matter of Bonnaffé.

what the law requires—adjust and settle these claims—are called upon to institute an inquiry as to the residence of the respective creditors, and the claims of all such as reside out of the limits of the United States are to be rejected. Surely, if the legislature had intended this they would have said the notice should be to the creditors residing within the United States, and not to all the creditors of the non-resident debtor. It is unnecessary to say, that no warrant for such a proceeding is found in the statute, and, to the honor of our legislature be it said, that no language used by them can be perverted to work such injustice.

Again, the trustees are to call a general meeting of the creditors of the debtor, at which all accounts and demands against the debtor are to be adjusted. How could the meeting be general if it is to be confined to a particular class, those only of a particular locality, and perhaps few in number? One of the definitions of the word general, is, common to many or the greatest number. Another is, having a relation to all, common to the whole. (Webst. Dict.) At this meeting all accounts and demands against the debtor which have been presented to the trustees are to be adjusted. The direction of the statute is not confined to those accounts and demands due and owing to residents of the United States, but to all, meaning the whole, the accounts of all who claimed to be creditors. The only restriction, as before observed, which the legislature in terms have thought proper to place upon the claims of the creditors, who are to participate in the dividend, is that the payment is to be among those who were creditors at the time the first attachment was issued. *Expressio unius est exclusio alterius*, is a sound and familiar maxim, and its application may with great propriety be here invoked. We find a further provision that any creditor, who shall have neglected to deliver in his account in time for the first or any other dividend, does not by such neglect lose his right to participate in the fund, but may come in. It is any creditor, who is thus protected by the statute—not the creditor of any particular class or locality, but any creditor of the debtor. It seems to me, that it is therefore clear beyond

Matter of Bonnaffé.

any serious doubt, that the legislature did not intend to confine the creditors who were to come in and share in the distribution of the debtor's estate, found and attached within this State, to those who may be residents of this State or of the United States.

What just motives of public policy would induce a legislature to adopt such a rule of action? It is well known that located in this State is the great commercial city of the Union, where is transacted business with foreigners to the amount of millions annually. Persons engaged in importations from Europe often have all the debts owing by them due to persons residing there, and the whole estate of the debtor is located here. The property represented by their debts finds its way here, and such a state of things exists as that it may be subject to attachment, the debtor being absent, absconding or concealed. He may owe debts here, contracted outside of his business, as surety, or otherwise, and the creditor residing here takes the property by virtue of his attachment, and appropriates it exclusively to the payment of his debt, in full; and the foreign creditor, who has parted with his property, never having received a cent for it, is to stand quietly by and see it thus appropriated, and such a wrong perpetrated. The establishment of such a principle would be a fatal blow to the commercial prosperity of our great city, to its commercial honor and integrity; would be revolting to the moral sense of our business community. I have no little gratification in finding that the laws of this State do not compel this court to lend its sanction or its aid to such flagrant injustice. Equality is equity; a just and equal distribution of the assets of a debtor, is what these statutes contemplate, and what is consistent with all our notions of honor and justice. The State does not lend its process or its power to seize the property of absent debtors for the exclusive benefit of our own citizens. It takes charge of it, in the first instance, to preserve it for creditors, and to compel the debtor to appear here and liquidate their demand. If he does not do it within such time as the law deems reasonable, then competent and proper persons are appointed to take

Matter of Bonaffé.

charge of the attached property, and convert it into money, and make just and equal division and distribution thereof among his creditors. The law makes the same disposition of the estates of intestates found within this State. They are administered upon, and the debts, if any, owing by the intestate, are paid without any reference to the residence of the creditor.

It is to be inferred from an examination of the reports of the revisers, when submitting chapter V to the legislature, that their attention was called to the fact that only a certain class of creditors might initiate the attachment, or become attaching creditors, while the language used in the Revision of 1813, and that used by them, permitted all the creditors to participate in the distribution of the funds realized from the attached estate. By section 23 of the act for relief against absconding and absent debtors (1 R. L., p. 183), every debtor who resided out of this State, and was indebted within it, was rendered liable to have his property attached. In commenting upon this statute, the Supreme Court, in *Fitzgerald's* case (2 Caines, 318), who was an absent debtor, and the attachment had been taken out by a creditor residing abroad, say: "The 23d section confines this remedy to the estates of debtors who reside out of this State and are indebted *within it*. By this mode of expression we understand that the debt must be due to a person residing within the State, and not to a stranger who may be here transiently. It is very well to give our own citizens a remedy over the property of their absent debtors, but it would be harsh and impolitic to extend this remedy to strangers, who might pursue the property here for the sole purpose of seizing it, and by this means drive its owner to a settlement on very unequal terms, or compel him to litigate in a distant forum, when perhaps both the parties, residing near each other, ought possibly to be left to apply to the tribunals of their own country." This case was decided in 1805.

In 1826 the case of Caldwell, an absconding debtor, came before the Supreme Court. (5 Cow., 298.) He fled from his creditors in Paisley, Scotland, and came to the city of New

Matter of Bonnaffs.

York, where he concealed himself. A creditor from Scotland came here and took out an attachment against him as an absconding debtor. It was moved to supersede it, on the ground that foreign creditors were not within the statute, and the case of Fitzgerald, an absent debtor, was cited to sustain the motion. But the court denied the motion, holding that the court, in deciding that case must have overlooked the 20th section of the act of 1813 (1 R. L., p. 162), which declared that any creditor residing out of this State should be deemed a creditor within the act, and that his attorney might act for him in the same manner as if he were personally present.

The next case which came before the Supreme Court, was that of *ex parte Schroeder* (6 Cow., 603), an absent debtor. His property was attached at the instance of a creditor residing in Hamburg, and the attachment was superseded on the ground that Shroeder never having been within this State, was not indebted within this State.

The revisers, in submitting their report to the legislature, in their revision of these acts say, in reference to section first (which was enacted in the precise words as drawn by them), that it embraces sections 1 and 23 (1 R. L., p. 157), and was drawn to conform to the decision in 6 Cowen, 603. These words of the section were reported in italics; "On a contract made within this State, or to a creditor residing within this State although upon a contract made elsewhere," and in reference to them, the revisers say, "The words in italics are new, and are intended to express the meaning of the legislature distinctly, as it seems to be understood in 5 Cowen, 293, and the cases there cited. (Vol. III, Revisers' Notes, ch. V, p. 1.) The 3d section of article I embraces the provisions of section 20, of 1 Revised Laws, page 162, which authorizes the application to be made by any creditor, resident within this State or out of it. We see then that the revisers have retained the law precisely as they found it expounded by the Supreme Court. First. In the case of an absconding or concealed debtor being an inhabitant of this State, the application for the attachment might be made by any creditor resident within this State or

Matter of Bonaffi.

out of it, or by his personal representatives. Second. In the case of an absent or non-resident debtor, the application may be made by any creditor, resident within this State or out of it, if the debtor is indebted on a contract made within this State, or the applicant be a creditor residing within this State, although the indebtedness arose on a contract made elsewhere. These provisions are in conformity with the views expressed by the Supreme Court in the case of Fitzgerald, already quoted, and were doubtless intended to give legislative sanction to them. But it is to be observed as a significant fact that the revisers, in submitting what is now the 37th section of article I, after the words, "any other creditor of such debtor," had this clause: "*Who might according to the foregoing provisions have made such application.*" These words were erased by the legislature, and the following, now standing in the section, were substituted in their place: "Having any demand against such debtor then due, whatever may be its amount." (Vol. III, Revisers' Notes, ch. V, p. 11.) These facts furnish us with controlling evidence of the intention of the legislature, in making these enactments. They clearly indicate, and without doubt for the reasons suggested by the Supreme Court in Fitzgerald's case, that in the case of an absent or non-resident debtor, an absent or non-resident creditor should not come into this State, where the contract of indebtedness had not been made, and attach the absent non-resident's property. The revisers, for the reasons suggested to their note to sections 39 and 40 (as reported by them §§ 36 and 37, 3 Revisers' Notes, ch. V, p. 11), and to protect the rights of other creditors, drafted these two sections to enable such other creditors to avail themselves of the benefits of an attachment issued against the property of absent debtors. But in their view, they wished to confine the privileges thus conferred to such creditors only as might have originally taken out the attachment, though the language used by them in the subsequent sections, as it is submitted has been already shown, allowed all creditors to participate in the distribution of the property attached. But the legislature interposes its negative to this, and says, true it is we will

Matter of Bonnaffé.

not allow non-resident creditors to attach the property of non-resident debtors unless the contract of indebtedness was made within this State, yet it is the settled principle of our laws that the assets of an insolvent should be equally distributed among all his creditors, without reference to their locality or residence. When the property of an insolvent is attached, and taken into the custody of the law, and it proceeds to its administration and distribution, all the creditors shall equally participate therein. To effectuate this, the legislature erased the restriction proposed, which confined the right to become attaching creditors to those only who might have taken out the attachment, and substituted in its place the words "having any demand against such debtor, then due, whatever may be its amount"—words embracing all and every creditor having a demand of any character, without reference to the locality of its contraction. The subsequent provisions of the statute are in harmony with the letter and spirit of this legislative action, and if there could be any reasonable doubt of the proper construction to be given them, I think that doubt is entirely removed by this clear and emphatic expression of the legislative will. I arrive at the conclusion, therefore, that the trustees and the courts below have properly decided, that all the creditors of the non-resident debtors, without reference to their place of residence, were entitled to have their claims and demands allowed by the trustees, and to participate in the distribution of the funds in the hands of the trustees in proportion to their respective demands. Whatever any of them may have received on account of such claims, in France or elsewhere, should be deducted from the dividends to be paid to them here, so that all may be placed on a perfect equality.

The remaining question for consideration is, whether the creditors residing in France, who became parties to the proceedings there by joining in and signing the concordat, or by receiving dividends under it, are precluded from participating and sharing in the distribution of the fund in the hands of the trustees. These persons were creditors of the non-resident

Matter of Bonhaffé.

debtors at the time the attachment was first issued, December 10, 1847, and continue such, unless their debts have been discharged by the concordat. On the 30th of November preceding, judgment of failure, under section 440 of the French Code had been pronounced by the Tribunal of Commerce in France, and section 443 of that Code declares, that the effect of that judgment is, that it operates by full right from its date the divestiture of the failed person of the administration of all his property. At this time, pursuant to article 451, a judge commissary was designated, and provisional syndics or assignees, were appointed, who immediately took possession of all the property of the insolvents, and put their seals upon the same, and the persons of the insolvents were then in custody. On the 11th of December, the same persons theretofore designated as provisional, were appointed definite or permanent assignees or syndics, and on the 12th of May, 1848, they made their report to the creditors of the insolvents, assembled pursuant to article 504. In that report, they mention the fact of the attachments issued in this State, on the property of the insolvent debtors. They state that the insolvents were ready to make a proposition to their creditors. By article 504, this meeting is convoked to deliberate on the formation of the concordat, or composition to be made between the insolvent and his creditors; and by article 505, the judge commissary is to preside at the meeting, and the debtor is to be present. At this meeting the insolvents made the proposition, to be entirely acquitted and discharged towards them, the creditors, by making surrender to them of their assets, as well in the States of America as elsewhere, to be sold and liquidated. And the proceedings state that these propositions were accepted by the creditors. In conformity with article 507 of the Code, a concordat or composition was then drawn up, and signed by the creditors, and the insolvents, which contained four articles: The first provided for a surrender and abandonment by the insolvents to their creditors of all their assets, as well in the United States as elsewhere, to be sold and liquidated under superintendence. Article second provided, that the liquidation should be

Matter of Bonnaffé.

made by one of the insolvents, whom the creditors thereby made commissioner for that purpose. Article third provided, that the bankruptcy expenses and debts entitled to preference were to be deducted from the assets, and the remainder distributed *pro rata*, among the creditors. Article fourth declared, that as soon as the concordat should have been confirmed, the sentence should be made known to the assignees, who should thereupon give up their accounts to the bankrupts, and the latter should be free in their persons and their property, and consequently an unconditional withdrawal was granted to them of all seals and executions which might have taken place for the things which belonged to them, as well as the inscription required on their goods and real estate by the assignees.

By article 510 of the Code, if the debtor has been condemned, as a fraudulent bankrupt, the concordat cannot be formed. And by article 511, if the failed party has been condemned as a simple bankrupt, the concordat can be formed. By article 512, any creditor can make objections to the concordat, and by article 513, the homologation or confirmation of the concordat shall be heard before the Tribunal of Commerce, and it shall not decide before the expiration of eight days.

By article 516, the homologation or confirmation of the concordat, renders it obligatory on all the creditors named or not named in the balance sheet. By article 518, no action to annul the concordat can be received after the homologation thereof other than for fraud discovered after said homologation. Article 519 provides, that as soon as the judgment of homologation shall be definite, the functions of the syndics shall cease; they shall deliver to the failed person their final account in the presence of the judge commissary, and they shall deliver to the failed person the totality of his assets, books, papers and effects. In this case the homologation, of the concordat formed, was made by the tribunal in conformity with the Code.

It is urged by the counsel for the appellants, that these proceedings in France are equivalent to proceedings under the English bankrupt act, and that thereby the debts of the French creditors, or those who have come in under those proceedings

Matter of Bonnaffé.

by receiving dividends by virtue of them, have become discharged. In other words, they have ceased to be creditors of the non-resident debtors, whose property is in the hands of the trustees here for distribution. The effect of proceedings in bankruptcy in England, was settled by this court in the case of Coates & Hillard. (Decided, December, 1856.) We then held that the debt of the petitioner in that case was extinguished by the discharge in bankruptcy, and that the creditors affected by those proceedings could not participate in a dividend declared by the trustees of the non-resident debtors here. It was said, that "debtors and creditors were all subjects of Great Britain and domiciled in England, the debt was English in its origin, and the creditors have received the dividend under the English bankruptcy." Under such circumstances, it was held, that the discharge of the debt was valid and to be respected in all other countries, and that the debt was extinguished between the parties. If we find, on examination, that the provisions of the Code of Commerce in France, relating to the bankruptcy of the insolvent debtors, and the concordat entered into between them and their creditors, and confirmed by the judgment of the Tribunal of Commerce, are equivalent to a discharge in bankruptcy, under the English bankrupt act, then we are bound to hold the judgment of the trustees erroneous.

In looking at the concordat, to ascertain what in truth are its terms and what is its legal effect, we are to confine ourselves to the stipulations therein contained. The prior negotiations, conversations or propositions are to be excluded. The concordat was intended to, and in its nature did, cover the whole subject matter of the propositions and communications in reference thereto, and as soon as it was signed it superseded all that had gone before, and constituted the only contract between the parties in reference to the subject matter of it. (*Renard v. Sampson*, 2 Kern., 561.) We fail to see anything in the Code which authorizes the Tribunal of Commerce absolutely and unqualifiedly to discharge the bankrupt from his debts. The policy of the law would seem to be that, if his

Matter of Bonnaffé.

failure is fraudulent, no concordat or composition can be made with his creditors, but he is treated as a criminal, and his property is arrested and taken from him, and applied towards the payment of his debts. I have been unable to find any provision which discharges him absolutely and unqualifiedly from them.

If the failing party has been condemned as a simple bankrupt, then the law permits him to make a concordat or composition with his creditors. The French law does not allow, upon the failure of parties, that they may make private arrangements with their creditors. In harmony with the institutions prevailing there, on the happening of a failure, the government immediately interferes and seizes both the debtor and his effects, and places the latter in charge of temporary syndics. They examine into the circumstances of the failure, and if they find it to have been inevitable and without fraud, then, if the tribunal so adjudges, the insolvent is at liberty to arrange with his creditors, on such terms as shall be to them mutually satisfactory. But so jealous is the government that it watches carefully all the proceedings, and they must be had in the presence of its judicial officers, and be sanctioned by the judgment of its courts. In the present case such a concordat was formed, or agreement of composition entered into, between the insolvent debtors and their creditors, and it is set out in the proceedings before us, and its provisions have already been quoted. I have examined it carefully, and I am unable to find any clause which conveys the idea that the insolvents were by its terms discharged from their debts, or from any portion of them. The only stipulation or agreement on the part of the creditors is, that if the tribunal shall sanction the concordat, and that judgment shall be made known to the syndics, that then they, the syndics, shall give up their accounts to the bankrupts, and the latter shall be free, in their persons and their property. That is, that they shall be discharged from the arrest made at the time of their failure, and the property then taken from them is to be surrendered up to them by the syndics, who since that period have had

Matter of Bonnaffé.

it in charge; and at the same time the syndics were to render their accounts to the bankrupts. These stipulations would be necessary to enable the person selected as the commissioner to liquidate the estate, and pay over the proceeds, according to the terms of the concordat, among the creditors. That this is the meaning of the stipulation or agreement is, I think, plain from the words which follow: "Consequently an unconditional withdrawal is granted to them, of all seals and executions which might have taken place for the things which belonged to them, as well as the inscription required on their goods and real estate by the assignees." The creditors, as they might under the law of France, elected to permit the failed person to continue in the possession and control of his estates. He was to administer it, for the purpose of paying off his debts, and it is I think apparent that the question of the ultimate discharge of the debtors was left to await the result of such administration. It was no doubt in the contemplation of both creditors and debtors, that if, at the end of such administration, it should be made satisfactorily to appear to the creditors, that the debtor had faithfully settled up the estate, collected in its assets, and fully paid over all that he received to his creditors, that then they would grant him a discharge for any balance which might remain unpaid. But there was no agreement in the concordat making it obligatory on the creditors to accept the proceeds of the debtor's estate in full of their respective debts, and I think such a stipulation was properly postponed, as a security for the fidelity of the debtor who took upon himself the liquidation of the estate. This view is, I think, fully sustained by the note to section 519 of the Code (see Code Francais Expliqué, p. 57), it says: The concordat, as we have already observed, replaces the failed person at the head of his affairs. It is to him after that, that the syndics are to render their account, as by the events they have become his agents. They should also deliver to him the whole of his goods of which he had been dispossessed, for the concordat operates as a surrender of the property dispossessed. The failed person, by the concordat, finds himself released

Matter of Bonnaffé.

from the constraint of his person, and discharged from that portion of his debts, of which a remission has been made to him, but he shall not be able at any time to obtain his rehabilitation, without proving that he has paid in full any sum due by him, principal, interest and costs.

The rehabilitation, or restoration of the debtor to his commercial rights and standing, is provided for by section 604 of the Code. It declares that the debtor who shall have fully discharged the principal, interest and expenses of all debts due by him, shall be able to obtain his rehabilitation; and by section 608, every creditor who shall not have been paid, in full, his debts, in principal, interest and charges, may make opposition to the rehabilitation.

We thus see that a debtor cannot obtain his restoration until his debts are paid in full, even though his creditors may have agreed to remit or discharge them by the concordat, and that if he is discharged from them at all, it must be by the concordat. There is nothing in the Code, that I have been able to find, which operates as such discharge, in either aspect in which the failure is regarded, excusable or non-excusable. If the latter, he is certainly not discharged, from anything I can discover; and if excusable, and the concordat is formed, then it depends upon its terms, whether the debtor is or is not discharged. The note to section 519, already quoted, declares the debtor to be discharged from that portion of his debts, of which a remission has been made to him by the concordat. It follows that if no remission has been made by the concordat, that he is not discharged from any portion of his debts, and he stands in relation to them as if no failure had taken place. Nothing has yet been done, so far as the facts are before us, which warrants the assumption that these debtors had been discharged from any portion whatever of their debts.

These views are not impaired but, I think, strengthened, by the extract furnished by the appellant's counsel from an approved treatise on Failures and Bankruptcies, and it is to be observed that the author makes a distinction between the two. The former seems more in the nature of a suspension, while

Matter of Bonnaffé.

the latter speaks the unmistakable language of bankruptcy, total inability to pay one's debts. This author says: "All the debts contracted by the debtor before his failure, are completely extinguished and replaced by the new engagement, which the majority of the creditors have settled upon or determined by the concordat. The failed person is legally liberated from that portion of his debts which have been remitted to him, *to that extent* that his subsequently acquired property cannot be taken for payment of them: nevertheless, in the court of conscience he remains a debtor, so long as he has not paid his creditors in full." (*Saint Nizant, Traité des Faillites et Banqueroutes*, tom. 3, p. 222, Paris, 1843.) It is to be particularly noticed that, according to this author, the existing debts are only extinguished and replaced by the new engagements of the concordat; this must mean the new engagements of the concordat in reference to those debts. We see, on examining this concordat, that it contains no engagement whatever in reference to these debts, and that no portion of them has been released by the creditors. The debtor therefore has not been legally discharged from any portion of his debts, nor have any new engagements been entered into, in reference to these debts or any part of them. Judging from the terms of the concordat, the debtors stand precisely, in reference to them, as if no such instrument had been formed; and I am unable to see, that they have obtained any discharge of their debts or any portion of them, or that their creditors have released or agreed to release them from such debts or any part thereof. In law, and in the court of conscience, they still remain liable for the whole amount of such debts, as the same existed at the time of their suspension, with the exception of such part as has been paid. Such certainly is the condition of the debts due to persons here, who only are parties to the attachment proceedings; and such, I think, is the condition of the French creditors, parties to the concordat.

The appellant's counsel relied with some confidence upon the Case of *Quelin v. Moisson*. (1 Knapp's Privy Council Cases, 265.) There Quelin had been adjudged a bankrupt by the

Matter of Bonnaffé.

Tribunal of Commerce, and obtained a protection from arrest. He was afterwards prosecuted as for a fraudulent bankruptcy, and was condemned as such. The note, on which the action was brought, was proven by the holder under the bankruptcy, and afterwards indorsed to Moisson, who sued Quelin, the maker. He pleaded his bankruptcy in France in bar to the action. The plea was overruled in the court in Jersey, and, on appeal to the Privy Council, two questions were directed to be submitted to two French advocates. *First*. Whether a person whose property has passed to syndics under the law *de la faillite*, could afterwards be sued by any creditor who had proved his debts before the syndics. The second question is not important to the point now under consideration. The French advocates answered to the first question, that the bankrupt could not be sued even by a creditor who had not proved his debts before the syndics, and *a fortiori* could not be sued by one who had. And thereupon the Privy Council reversed the judgment.

It will be seen that that case differs from the present in this that there the bankrupt was divested of his estate, and it passed into the hands of the syndics, and it also differs in the important fact that in that case no concordat was formed or entered into between the debtor and his creditors. It may well be, where the proceedings is wholly adverse to the debtor, and his estate is taken from him, and administered upon by the agents of the law for the benefit of all his creditors, that the latter should be held bound to look to that fund only for the satisfaction of their debts. That is not the present case. Here the debtor and creditors have mutually surrendered the rights and advantages secured to each by the law, and substituted therefor an agreement. The rights of the parties are therefore to be determined by its terms and stipulations, and we have seen, by our examination of them, that no portion of the debts due by the failed debtors have been released, and no agreement made to release them. It is not perceived that the decision of the Privy Council in *Quelin v. Moisson*, establishes any rule in conflict with the views expressed in this opinion.

Matter of Bonnafé.

The analogy, therefore, which is sought to be established between these proceedings and those under the English bankrupt act, entirely fails. Under the latter the certificate operates as a discharge of any debt, claim or demand which might have been proven under the commission. The debt, by the proceedings, is discharged, wiped out, and the creditor has not, therefore, any debt or demand against the debtor to prove and establish before the trustees. It is true that he once had a debt, but by operation of law it has been discharged and extinguished, and it was upon this ground that this court held, that the creditors of Coates & Hillard, who were parties to the proceedings in bankruptcy in England, had ceased to be creditors, and could not therefore come in before the trustees here and participate in a dividend. The decision in Coates & Hillard has no application to the present case; and the proceedings in France, and the stipulations of the concordat, present no obstacles to the creditors who were parties thereto, or residing there, from proving their claims and participating in the dividends declared by the trustees in this State. All sums received by them on account of their respective debts or claims in France or elsewhere, are to be credited and allowed as so much received on account of dividends, so that all the creditors may share equally in the distribution of the non-resident debtor's estate.

The order appealed from should be affirmed, with costs.

COMSTOCK, Ch. J., and SELDEN, J., without expressing any opinion as to the operation of the concordat, in respect to the future accumulations of the debtor, concurred on the ground that such discharge as it effected, was granted in contemplation of all the insolvent's existing property being applied to the payment of his debts, and did not impair the right of any creditor to share in the proceeds of such property. DENIO and MASON, Js., also concurred; LOTT, JAMES and HOYT, Js., dissented.

Order affirmed.

The People v. Commissioners of Taxes and Assessments.

THE PEOPLE, *ex rel.* THE BANK OF THE COMMONWEALTH, v.
THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR
THE CITY AND COUNTY OF NEW YORK.

Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State.

The taxation by the State of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States where no unfriendly discrimination to the United States, as borrowers, is applied by the State law, and property in its stock is subjected to no greater burdens than property in general.

Whether Congress, for the purpose of giving effect to its power to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *Quere.*

The cases of *McCullough v. Maryland* (4 Wheat., 116); *Osborn v. United States Bank* (9 Wheat., 738), and *Weston v. The City of Charleston* (2 Pet.), examined and distinguished.

APPEAL from a judgment of the Supreme Court. That court, upon the application of the Bank of the Commonwealth, awarded a *certiorari* to the commissioners of assessments and taxes of the city and county of New York, for the purpose of reviewing their proceedings in assessing that corporation, in the year 1859. It appeared from the admissions in the return of the commissioners, that the Bank of the Commonwealth was a banking association organized under the general banking law, with a capital actually paid in of \$750,000, out of which it had paid \$188,834.84 for real estate consisting of its banking house, leaving \$561,165.16, of which \$108,000 was invested in the stock of the public debt of the United States, of the loan of 1858, which was actually owned by the corporation at the time the assessment was made. The bank claimed before the commissioners, that the stocks of the United States were exempt from taxation under the Federal Constitution; but that board held otherwise, and assessed the corporation for

personal estate for the whole balance of capital after deducting the sum paid for real estate, and it was taxed thereon. The Supreme Court held that the stocks referred to were not exempt from taxation in this case, and affirmed the assessment: upon which the present appeal was brought by the Bank.

Alexander W. Bradford, for the appellants.

Greene C. Bronson, for the respondents.

DENIO, J. This case has been argued upon the assumption that the funded debt of the United States in the form of stock, is, by the Constitution, absolutely exempt from taxation by the state governments. Hence, the position mainly argued by the counsel for the city of New York, was that the existing law for the assessment and taxation of corporations, of the class to which the appellant belongs, looks to the capital stock of the corporations paid in, or secured to be paid in, as the subject of taxation, irrespective of the manner in which it has been invested. Consistently with this position it is argued that it is not a circumstance of any importance, that a portion of the moneys contributed by the subscribers has been invested in property not in itself subject to taxation; that it is the same thing in effect as though so much money had been lost; and if such had been the case, it is further insisted that the corporation would, notwithstanding, be liable to taxation in the whole amount of capital originally paid in, or secured to be paid in, except such portion thereof as had been paid out for the purchase of real estate. If the provisions of the Revised Statutes respecting the taxation of moneyed corporations had remained unchanged, the argument would have had much weight; for the principle of taxation which these enactments established, was that the amount of the capital, with the exception before mentioned, was to be taken as the amount of the personal estate of the corporation for which it was to be taxed, whether it had been impaired by losses or increased by accumulated profits. (1 R. S., 414, §§ 1 to 6; *Bank of Utica v. City of Utica*,

The People v. Commissioners of Taxes and Assessments.

4 Paige, 399; *The People v. Board of Supervisors of the county of Niagara*, 4 Hill, 20.) In substance, it was the institutions which were taxed under these provisions, and not the property possessed by them at the time the assessment was made. The measure of assessment was the nominal capital originally contributed, which was compared, in distributing the public burdens, with so much property actually possessed by natural persons who were taxpayers. Under such a system it might be fairly argued that it was unimportant in what manner the moneys had been invested, for the existing property was not an element which entered into the valuation; but it was the sum which the corporation had, when all the subscriptions had been paid in and before any investment had been made. The character of the investments would be immaterial. But this rule had been changed before the assessment under consideration was made. In the year 1853, the amount of surplus profits, or reserved funds, was directed to be added to the amount of the capital, and there was a provision for exemption in the case of corporations which had not been in the receipt of net income (ch. 654). It is not material to determine whether these provisions would have affected the question; for in 1857 an act was passed, which completely changed the system of assessment of these corporations. The material provision was as follows: "The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, *or shall have been exempted by law*, together with its surplus profits, or reserved funds, exceeding ten per cent of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as the other personal and real estate of the county" (ch. 456, § 3). It is manifest that under this provision, the assessors could not any longer take the nominal capital as, under all circumstances, the amount of the assessment. If it were alleged that this did not represent its actual value, it would be their

The People v. Commissioners of Taxes and Assessments.

duty to look at its market price, and, if necessary, to ascertain the character and worth of the securities in which its funds had been invested. It would be equally their duty to inquire whether any of this property, into which the capital had been converted, was exempted by law from taxation. *Prima facie* it may be that the nominal amount of the capital would be considered its actual value; but where it should be shown that it had met with losses, or that its investments had otherwise depreciated, other means would have to be resorted to in order to ascertain the actual value of the assets in which its capital consisted. The market price of its shares would ordinarily furnish a practical test; but either the assessor or the taxpayer would have a right to examine and have an estimate made of the value of the securities. (*The Oswego Starch Factory v. Dolloway*, 21 N. Y., 449.) The reference to exempt property in the section of the statute which I have transcribed, is *in pari materia* with the 4th section of the title of the Revised Statutes relating to property liable to taxation. That section declares that all property exempted from taxation by the Constitution of this State, or under the Constitution of the United States, shall not be liable to be assessed or taxed under these provisions. (1 R. S., 388.) It follows, therefore, from the very language of the statutes, that if the Bank of the Commonwealth has invested a part of its capital paid in, in a stock which is exempt from taxation under the Constitution of the United States, such portion is to be excepted from the assessment. The position of a bank in this respect is precisely the same as that of an individual taxpayer. It is, as a general rule, assessed and taxed for all its property of every kind; but there is an exception as to such part of it as the Constitution and laws of the Union and of the State have, upon special reasons of policy, declared shall be exempted. Whether such exempt property is found in the hands of an individual, or in the possession of a corporation taxed upon the actual value of its capital, the rule is the same: the exempt property is to be deducted from the aggregate valuation, and the tax is to be imposed upon the residue.

The People v. Commissioners of Taxes and Assessments.

The question then arises, whether the public debt of the United States is exempt by the Federal Constitution from taxation under the general laws for the assessment and collection of taxes which are in force in this State. It is essential in the outset, to have a clear perception of the principles upon which taxes are imposed under our State laws. We do not select particular subjects of taxation and, upon motives of policy, burden these with the public contributions or a disproportionate part of them in exoneration of the other property of the citizen. The rule, on the contrary, is to tax every person for all the property he possesses. This doctrine is announced at the commencement of the chapter of the Revised Statutes, respecting taxation: "All lands and all personal estate within this State, whether owned by individuals or by corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." (1 R. S., 387.) The exceptions are inconsiderable, and only tend to prove the universality of the principle. And there is no artificial rule of valuation, by means of which a discrimination can be made, in favor of or against any particular species of property. The real estate is to be assessed at its full and true value, and that at which the assessors would appraise it in payment of a just debt due from a solvent debtor; and the personal estate is to be set down at its full and true value, over and above the amount of debts due from the person assessed. (Laws of 1851, ch. 176, § 8.) If, therefore, the stock in question is assessable at all, it is to be included in the mass of the taxpayer's property, and is to be set down at what it is really worth, in the same manner as every other item of his taxable property. It is not taxable by name; and there is no discrimination in favor of or against it, but the bond or script which furnishes the evidence of the title is regarded like any other security for money.

Having premised thus much, the question recurs whether there is anything in the Constitution of the United States, which, by a fair interpretation, forbids the States under their tax laws from including in the aggregate valuation of the taxpayer's property, in respect to which he is to be taxed,

The People v. Commissioners of Taxes and Assessments.

money which he has lent to the Federal Government, for which he holds its evidence of indebtedness. It is the constitution alone which is to be looked to, for congress has never passed any statute on the subject. That body has from time to time authorized the executive department to borrow money, to fix the rate of interest to be paid, and to pledge the public credit for its payment; but it has not undertaken to restrain or limit the taxing powers of the State governments, in respect to the money lent or the script or securities to be issued upon such loans. It has said nothing on that subject. If there is any such restraint or limitation, it exists in the Constitution itself. Among the attributes conferred upon congress by that instrument is the power, "to borrow money on the credit of the United States." (Art. 1, § 8.) Then the Constitution declares that itself, and the laws made pursuant to it, and the public treaties, shall be the supreme law of the land, and paramount to the State Constitutions and laws. (Art. 6, ¶ 2.) It may be safely admitted that any act of a State Legislature forbidding, or placing any substantial obstacles in the way of negotiating, Federal loans from the citizens of such State, would conflict with the Constitution. As the constitutional power to borrow money does not declare that it shall be procured within the Union, or from citizens of the United States, there is, perhaps, no corresponding duty on their part to lend. Nor was it intended that any such duty should be imposed. No enabling power in respect to the lender was required. Nothing was necessary but that the political corporation, which it was proposed to establish, should be endowed with the faculty of borrowing on the public credit. As to the rest, the money markets of the world were looked to for furnishing the other parties to the contract of lending. An unfriendly act of legislation which should exclude the Federal Government from resorting to the money markets of a particular State for loans, though it might not seriously affect the exercise of the borrowing power elsewhere, would be so obviously hostile to the operations of the government, that I am confident it could not be sustained; and such is, no doubt, the effect of the judgment of the Supreme Court of the United

The People v. Commissioners of Taxes and Assessments.

States in the case to be presently mentioned. But our laws for the assessment and collection of taxes, supposing them to include shares in the public debt of the United States along with other personal property of the citizen, leave the Federal Government in precisely the same condition with any other borrower. It was the practice of independent governments, as well as of municipalities and trading corporations, anterior to the Constitution, as it is now, to borrow money in their own or in foreign States. The citizens of the several States though not at that time lenders in such loans to any considerable extent, were capable of becoming such. They might lend money to the Federal Government, to the State governments, to foreign nations and to individuals. As to none of these, except the United States, is there any pretense that the State legislature was obliged to waive the right of taxing the lender for his property in the obligation taken to secure the repayment of the money loaned. In like manner, the Government of the United States possesses the same power to borrow in the marts of the old world as of its own citizens. But the foreign lender would of course be subject to the laws as to taxation, prevailing in the country of his domicil. The claim, therefore, which is now interposed on behalf of the Federal Government, is of a right to present itself as a borrower in the money markets of this State, in a different and far more favorable position than our own State government occupies, when it has occasion for a loan, and, of course, than that which other borrowers, public, corporate or private, foreign or domestic, can pretend to. It is, moreover, the claim of a right to impose upon the legislature of the State, disabilities in respect to the taxation of moneys loaned to the United States, which there would be no pretense for challenging against any foreign country, to which they might resort for the negotiation of loans. The claim is not supported by any specific language in the Constitution pointing to such consequences, nor as we have said by the terms of any statute, but simply upon the power to borrow money upon the public credit conferred by the Constitution. Such a power, conferred by such general language, seems

The People v. Commissioners of Taxes and Assessments.

to us fully satisfied, so far as the State governments are concerned, when no unfriendly discrimination towards the United States, as borrowers, is applied by the State laws; when the General Government is admitted to negotiate upon the same terms as other borrowers, public or private, with such of our citizens as may choose to become lenders of money, and when they are placed on the same precise footing in all respects, as all other borrowers. *Prima facie*, the provision simply confers upon the government a capacity to become parties, as borrowers upon the public credit, to a contract of loan. If it had been intended, beyond this, to give them, in the States of the Union, an advantage over all other borrowers, it is certainly remarkable that more explicit language was not used. We give no opinion on the question, whether Congress could enact a law by which the lenders of money to the government, should enjoy the advantage of exemption from State taxation in respect to such loans. Events may occur—perhaps they have already occurred—when the preservation of the Constitution and the continuance of the Union, may depend upon the ability of the government to obtain a seasonable supply of funds, and we would not unnecessarily interpose a *dictum* which would appear to circumscribe any powers which it may possess. But in the absence of any such statute, and resting upon the general grant of power contained in the Constitution, we are of opinion that the claim to be exempt from taxation cannot be allowed to prevail.

The argument in favor of exempting the holders of Federal indebtedness from State taxation is principally based upon the consideration of the paramount authority of the Federal Constitution over the Constitutions and laws of the States. The preëminence of the former is beyond dispute. It is inherent in the nature of an imperial government, instituted to watch over and protect the interests and welfare of particular local governments. The powers conferred for such purposes must necessarily be absolute and uncontrollable. All general reasoning upon the subject is, however, rendered unnecessary by the explicit provision referred to in the Constitution itself.

The People v. Commissioners of Taxes and Assessments.

But before the State enactments can be called upon to yield to Federal institutions, it must satisfactorily appear that there is a conflict between them. Undoubtedly the Federal Government could enter the money market with greater advantage, if it could promise to the lenders an immunity against State taxation in respect to the money to be loaned. But, as no other borrower can offer any such advantage, and as, without it, loans have always been sought and obtained, and, no doubt, will continue to be, the withholding of it cannot be justly considered a restraint upon the borrowing power. What is asked is not in truth the removal of an obstacle, but a positive bounty to the lenders of money to the government. It is claimed that an advantage should be conceded to them which is rightfully withheld from every other lender. Hence, it appears to us that there is no hostility between the laws of this State which attempt to tax its citizens, among the mass of their property, for all their money loaned, without any exception of such as may have been lent to the Federal Government, and the power to borrow money which the Constitution has conferred upon that government. Both provisions can stand perfectly well together, and there is not really any conflict between them.

The power of taxation is as essential to the existence of the State governments as that of borrowing is to the nation. Both undeniably exist. The right of the several States to include the public creditors, in respect to the money owing to them by the nation, among the taxpayers, may be one of great importance. The amount of property existing in that form is now very large; and public measures transpiring at this moment show that it is to be greatly increased. A judgment which should exonerate that mass of wealth from liability to contribute to the expenses of the State governments, might lead to considerable embarrassment. Besides, it would create a class of favored citizens, who could put the tax-gatherers at defiance, while the mass of the community would be left to defray the whole expense of the State and local administrations. This, it is true, should not prevent the rendering of such a judgment, if the true

The People v. Commissioners of Taxes and Assessments.

interpretation of the Constitution requires it. But if it shall appear that the power of the Federal Government to contract loans cannot be materially impaired by holding the public creditor liable to pay his share of the public burdens, while the administration of the fiscal affairs of the States will be seriously embarrassed by withdrawing a large mass of the property of the citizens from liability to taxation, those circumstances (which are now actually transpiring) would seem to call for a reconciling construction which will allow both the great political powers to exist without either being essentially impaired. The necessity of such a construction of the Federal Constitution was foreseen while the draft of that instrument was under discussion, prior to its ratification by the State Conventions. One of the most indispensable powers conferred upon Congress was that of laying and collecting "taxes, duties, imposts, and excises." But as the great bulk of the expenses of public administration was left to be defrayed by the States and their local divisions, the national government being limited to external relations and a few subjects of internal government, it was essential that the right of taxation should continue to be enjoyed by the States, to enable them to meet these necessary expenses. They were, however, prohibited from laying duties upon imports or exports, or upon tonnage, without the consent of Congress; but as to all other subjects of taxation, embracing the real and personal estates of the citizens, the Constitution was silent as to the rights of the States. A rigid construction of the provision making the Federal laws, enacted pursuant to the Constitution, supreme over those of the States, would forbid the latter from exercising a concurrent right of taxation over subjects as to which the taxing power of Congress should be applied. Suppose, for instance, that the General Government should lay a land tax, could a State Government do the same thing while the Federal law remained in force? True, if the State tax was of moderate amount, the land-owner would be able to pay both, and thus no embarrassment would arise to the General Government. But it might be said, if you admit the principle of concurrent taxation by

The People v. Commissioners of Taxes and Assessments.

the States, it will not be possible so to limit the amount as to prevent inconvenience in the exercise of the Federal power; and the Federal laws are declared to be paramount to those of the States. Hence, it was apprehended that the taxing power of the States might be held to be taken away by the like power which the Constitution conferred upon Congress. This objection was treated of in the 82d and 83d Letters of Publius, written by Mr. Hamilton. He maintained, by a convincing train of reasoning, that the taxing power of Congress was not, in respect to any subjects except imposts, exports and tonnage, exclusive of or superior to that of the States, but that they were concurrent. "The necessity," he said, "of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed Constitution." (Federalist, No. 82.) He insisted that it was not a case of repugnancy in that sense which would be requisite to work an exclusion of the States. While he admitted that it was possible that a State might tax a particular kind of property in a manner which would render it inexpedient that a further tax should be laid on the same subject by the Union, he still held that it would not imply a constitutional inability to lay such further tax. He conceded that the particular policy of the national and the State systems might now and then fail to coincide exactly, and that forbearance might be required. "It is not, however," he added, "a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a preëxisting right of sovereignty." (Id.) And he concludes, as the result of the whole argument, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent they might stand

The People v. Commissioners of Taxes and Assessments.

in need of, by every kind of taxation except duties on imports, exports and tonnage. (Federalist, No. 33.)

The repugnancy between the concurrent powers of taxation residing in the General and in the State governments seems equally as striking as that which is alleged to exist between the Federal power of borrowing money and the State power of taxing all the property of the citizen, including his money invested in loans to the government. It may be said that the latter power can be exerted to an extent which would impair the efficiency of the other. But such an effect, if produced, would be incidental and indirect. State taxation might, it is true, supposing a very extreme case, be carried to such an extent that nothing would be left to lend to the nation. But if no unfavorable discrimination is made as to money invested in federal loans, it cannot be alleged that such excessive taxation would be any more hostile to the borrowing power of the General Government than any other species of State misgovernment; and it can scarcely be pretended that the Federal institutions are supreme in such an absolute sense that any State power which, by a possible abuse, may impair the efficiency of some national attribute, is necessarily abrogated. Indeed, the complaint on the part of those who oppose the claim of the State is, as has been already remarked, not so much that our State tax law conflicts with the Federal power to borrow money, as that it does not concede to the Union superior rights in our money market over those enjoyed by any other class of borrowers.

It remains to notice the judgments of the Supreme Court of the United States which, it is argued, have laid down principles which lead to the entire exemption of Federal stock from State taxation. In *McCullough v. The State of Maryland* (4 Wheat., 116), the question, in substance, was, whether the issues of bank notes by the Maryland branch of the Bank of the United States could be subjected to a stamp tax under the laws of Maryland. That State had passed an act requiring banks transacting their business in that State, but which were not chartered by the State legislature, to issue their notes on

The People v. Commissioners of Taxes and Assessments.

stamped paper on which a certain duty was to be paid, but for which any bank might commute by paying a tax of fifteen thousand dollars a year in advance. A heavy penalty was provided against any bank officer who should issue unstamped notes; and the action was brought against McCullough, the cashier of the Baltimore branch of the Bank of the United States, to recover penalties for a violation of the act. The constitutional validity of the act of Congress incorporating the bank was largely discussed, and was passed upon by the court; and its constitutionality was sustained. The bank was considered a convenient, useful and essential instrument of the government in the prosecution of its fiscal operations, and its establishment by Congress was held to be the constitutional exercise of the power "to make all laws which [should] be necessary or proper to carry into execution" the authority granted to the General Government. Then the question as to the power of the States to tax the bank or its branches was considered and determined. But when it had been once settled that the bank was a constitutional agency and instrument for the transaction of the moneyed operations of the government, it followed necessarily, as it seems to us, that it could no more be taxed by State authority than the treasury department, the mint, the post-office, or the army or navy; and it was upon this ground that the Maryland statute was held to be unconstitutional. The State power of taxation, which was admitted to embrace everything which existed by its own authority, or which was introduced by its permission, was held not to "extend to those *means* which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." (See opinion of Chief Justice MARSHALL, p. 429.) The same question again arose in *Osborn v. The United States Bank* (9 Wheat., 738), which was an action brought to test the validity of a statute of the State of Ohio, by which an annual tax of \$50,000 was imposed upon the Ohio branch of the Bank of the United States, to be collected by means of a warrant to be issued by the auditor of the State. The question was again elaborately argued and considered by

The People v. Commissioners of Taxes and Assessments.

the court, and the exemption of the bank and its branches again declared, on the ground that the institution was an instrument, or, as it was several times called in the opinion of the court, a *machine*, for carrying on the moneyed operations of the national government. In the State laws under consideration in both these cases, the branches of the bank were taxed, not in respect to their property, but, *eo nomine*, as banks, and because they were banks. Perhaps it may be inferred from the reasoning of the court that they would have been held equally exempt from taxation, if the tax had been laid on the corporation in respect to its capital or personal property. No idea, however, was entertained that the money which was invested in the stock of the bank was thereby withdrawn from State taxation. Indeed, such a conclusion was explicitly disavowed in the opinion of the Chief Justice, in the first mentioned case. "This opinion," he says, "does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid on the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." (4 Wheat., 436.)

Enough has been said to show that these cases bear no analogy to the one before us. But, in *Weston v. The City Council of Charleston* (2 Pet., 449, anno 1829), the subject of State taxation of the debt of the United States, in the hands of an individual, came directly before the Federal Supreme Court, and the judgment was against the right to lay the tax. The case differs from the present only in the circumstance that the tax was not laid upon the bulk of the property of the citizens, but only upon certain specified securities, and that it was imposed upon the United States stock *eo nomine*. It was imposed by the municipality of the city of Charleston,

The People v. Commissioners of Taxes and Assessments.

South Carolina, under authority derived from the legislature of that State. It was laid, as the report states, "upon all personal estate consisting of bonds, notes, insurance stock, *six and seven per cent stock of the United States*, or other obligations upon which interest has been or will be received during the year, over and above the interest which has been paid (funded debt of this State, and stock in the incorporated banks of this State and the United States Bank, excepted)"; and the amount of the tax was "twenty-five cents upon every hundred dollars." Real estate does not appear to have been embraced. Neither were goods or personal chattels of any kind, or slaves, or the stock of the General Government paying less than six per cent, or simple contract debts due to the taxpayer, or individual obligations on which, for any reason, interest should not be paid within the year; and the public debt of the State, the stock of all the State banks, and that of the Bank of the United States, were in terms excepted. It was not, therefore, a tax upon the property of the taxpayer generally; but particular kinds of property were selected from the mass, embracing, in all probability, far less than a moiety of the private property of the city, and the tax was assessed upon that, to the exoneration of all the residue. And the tax imposed was not limited to the aggregate of the public charges for the year; but an arbitrary sum was exacted of twenty-five cents on each hundred dollars, whether that should be more or less than the exigencies of the city government should call for. The different system upon which the taxes of this State are assessed, has been already shown. Under the ordinance of the city of Charleston, the United States would not enter the money market of that city upon an equal footing with all other borrowers. The State of South Carolina, for instance, could assure those who should lend it money that they should be exempt from city taxation, and the same advantage would be extended to capitalists who were minded to invest in the stock of the State banks or in that of the Bank of the United States. So, money or property invested in mercantile, manufacturing or other business, so long as it did not assume the form of interest-pay-

The People v. Commissioners of Taxes and Assessments.

ing obligations, would be exempt from taxation. The law, or ordinance, discriminated, in respect to taxation, adversely to certain classes of securities, including the scrip of the public debt of the United States. The effect upon the government was nearly the same as though the funded debt of the Union had been singled out as the sole subject of taxation. Including other securities, the whole constituting only a part of the property of the citizens which might be subjected to taxation, does not relieve the law from the charge of visiting the whole of the public burdens upon particular kinds of property in exoneration of the mass of it. Such a measure might arise either out of motives of hostility to the property charged or the business out of which it originated, or from a motive of hostility to the interests taxed, or a desire to favor the owners of the residue at the expense of such interests. In either case it might easily be carried to the extent of seriously discouraging or entirely destroying the interests discriminated against. But where all the private property of the community is taxed ratably, no such effect could follow; and under such a system, moreover, there is but little danger of oppressive taxation. In levying such a tax, the legislature acts equally upon all its constituents. In our opinion, the judgment last referred to is distinguishable in principle from the case we are considering, in the point to which we have now referred. If the Federal stock can be taxed separately and specifically at any amount which a State legislature, or a municipality to which its power has been delegated, shall see fit, the government in seeking to obtain money on loan may be effectually driven out of the markets of such State. But such a consequence could never happen under the existing tax law of this State. The idea that the legislature would dare, or would be permitted, by excessive taxation, to destroy or seriously embarrass the interests of all the property holders of the State, is not to be supposed.

Intending as we do to follow implicitly the matured judgments of the Supreme Court of the United States, pronounced in cases arising under the Federal Constitution and Laws, we yet conceive ourselves at liberty to receive or to reject any *dicta*

The People v. Commissioners of Taxes and Assessments.

which were not called for by the facts of the case adjudged, according to our own sense of their conformity or want of conformity to law. We are aware that some portion of the reasoning of the opinion of the court, prepared by the venerable Chief Justice in the case referred to, would embrace the present controversy, though other parts of it we think refer to the tax under consideration as laid specifically upon Federal stock; and that in the dissenting opinion of Mr. Justice THOMPSON, the majority of the court are understood to assume the broad ground that the stock of the United States is not taxable in any shape or manner whatever. But we think it was not legally possible for the court to decide, that such stock could not be taxed along with the mass of the taxpayer's property, under a taxing system like the one prevailing in this State, while determining a controversy in which the actual facts presented by the litigation disclosed a case of taxation discriminating adversely to such stock. Such a question as is claimed to have been decided, was not discussed by the counsel on the argument. The counsel for the plaintiff in error, who was the party seeking to avoid the tax, did not contend that the stock would be exempt under a system which should embrace all property or even all public funds. He said: "The ordinance does not impose a tax upon all public funds, but *specifically* on the six and seven per cent stock of the United States. Thus, there are selected as the particular objects of taxation, these debts of the Government of the United States." And the counsel laid before the court as a part of their argument the opinion of three of the judges of the Constitutional Court of South Carolina, who, holding that the stock was not taxable, dissented from the opinion of the majority: But they placed their dissent on the ground that the tax was upon the stock, *eo nomine*, and was thus a burden imposed upon the credit of the United States.

We differ with natural reluctance from even an *obiter dictum* of so great and wise a judge as Chief Justice MARSHALL, especially when apparently concurred in by a majority of the judges of the national tribunal of last resort; but we are happy to know that if we have fallen into an error, it can readily be

The People v. Commissioners of Taxes and Assessments.

corrected. If that eminent court shall, upon a reconsideration of the question, adjudge that stocks of this description are universally exempt from taxation, we shall cheerfully conform our judgments to such decision; but until such review shall be had, we think it safer to follow the direction of our own convictions. The question is confessedly one of very great importance. If we determine it in favor of the taxpayer, the public authorities cannot appeal to the Federal court, as it is only in the case of a right, claimed under the Constitution or laws of the United States, which has been denied by a State court, that the national tribunal has jurisdiction, whereas the judgment, which we actually render, can be carried immediately to the court of the last resort.

The judgment of the Supreme Court is affirmed.

MASON, J., also delivered an opinion for affirmance; SELDEN, LOTT, JAMES and HOYT, Js., concurred, without however passing upon the question first discussed, as to the construction of our statutes, as to which four of the judges were understood to express a different opinion from that stated by Judge DENIO.

COMSTOCK, Ch. J. (Dissenting.) The taxing power of this State does not extend to stocks issued by the Government of the United States. This proposition, in its broadest sense, was determined by the Supreme Court of the United States in the case of *Weston et al. v. The City Council of Charleston* (2 Pet., 449). In that case the corporation of the city of Charleston, deriving its powers from the State of South Carolina, had passed an ordinance subjecting personal estate within the city to taxation, and enumerating in the list of things to be taxed six and seven per cent stocks of the National Government. The plaintiffs, being the owners of such stocks, applied to the Court of Common Pleas for the Charleston District, for a writ of prohibition to restrain the city council from levying the tax on those stocks; on the ground that the ordinance was, in that respect, contrary to the Constitution of the United States. The prohibition was granted. The proceeding was brought

The People v. Commissioners of Taxes and Assessments.

into the highest State court for review, where the decision of the Common Pleas was reversed, and a decision was made that the ordinance was constitutional and valid. From that decision the plaintiffs brought error into the Supreme Court of the United States. In that court a preliminary question arose whether the judgment of the State Court was reviewable under the judiciary act of Congress. That question was decided in the affirmative; and then the only point to be determined was whether, by force of the Federal Constitution, the stocks of the Government were exempt from taxation in the States, and in the cities of the States. After a very elaborate argument, Chief Justice MARSHALL delivered the opinion of the court, holding that the ordinance of the city of Charleston was unconstitutional, so far as it subjected such stocks to taxation. The judgment of the State Court was accordingly reversed, and a judgment was directed to be entered declaring it to be the opinion of the court that the ordinance was repugnant to the Constitution and void.

This decision was pronounced by the high tribunal appointed by the Constitution itself to be the interpreter of its provisions. It has never been departed from, and, I think, never questioned in the slightest degree. It would therefore be entirely inappropriate for us to suggest the reasons by which the conclusion is supported. It would be, moreover, a work of supererogation, because the opinion of Chief Justice MARSHALL is not only convincing, but it leaves nothing to be added. It should be observed, however, in reference to what has been said in the present case, that the decision proceeded on the broadest possible ground. No suggestion was made in the reasoning of the court that the Government stocks had been invidiously selected for taxation with any purpose hostile to the Government or laws of the Federal Union. They had been assessed as the personal estate of individuals, and like other personal estates; and the simple and sole inquiry was, whether any power resided in the States, or in municipal bodies created under State authority, to tax them. This was determined in the negative, and we are bound by the decision. Upon all

The People v. Commissioners of Taxes and Assessments.

questions of conflict between the Constitution and laws of the Union and the constitutions and laws of the States there can, in the very nature of our political system, be but one rule of decision, and that rule must be declared in the last resort by the Supreme Court of the United States. In the consideration, therefore, of the question now before us, we must proceed on the fundamental assumption that stocks of the United States Government are absolutely exempt from taxation by any power in this State.

According to the assessment laws of this State, property is not taxed by enumeration or specification. All real and personal estate within the State is liable to taxation, with certain exemptions. (1 R. S., 387, § 1.) The local law or ordinance of the City of Charleston, adjudged to be void in the case which has been cited, enumerated the different species or kinds of property upon which revenue was intended to be raised, including the government stocks in the specification, the prescribed rate of taxation, however, being uniform. If in the case now before us, the exemption were claimed by an individual instead of a corporation, and if our law made no exception in favor of property exempt under the Constitution of the United States, the difference in circumstance between the case and the one determined by the Federal Supreme Court would be simply that which exists between taxation of all property without exception and taxation of certain classes, by a specification which includes property exempt under the Constitution of the United States. The taxing power of a State may be exerted in either of these modes as to all property which can be taxed. In the latter mode it cannot be exerted so as to embrace stocks issued by the United States, because the attempt to exert it is in violation of the Constitution. The fundamental question in this case, I think, is whether that description of property can be and ought to be embraced in assessing, according to the other mode, the personal estate of an individual or a corporation. I am satisfied for reasons to be presently given, that no distinction in this respect can be made between an individual and a corporation.

The People v. Commissioners of Taxes and Assessments.

It cannot be denied that State power might be exercised more inconveniently, not to say more dangerously, to the Federal Government in one of these modes, than in the other. In the one, the power might be used so as to exempt the mass of property belonging to the citizens of a State or municipality, and so as to cast the burden of State expenditure upon the credit of the Union. In the other, taxation is necessarily uniform upon all property, and flagrant abuse of power is perhaps impossible. Nevertheless, it seems to me, the question does not depend upon these considerations. As to all subjects over which the taxing power of a State extends, there are no limitations depending on the mode of its exercise. Discrimination between different kinds of property may be made in the pleasure of the legislature, where the right of taxation exists at all. Every holder of United States Government stock is a creditor of the government, and the value of all such stocks is more or less dependent on their exemption from burdens imposed by the States. If we admit the right, to tax this credit in any mode and to any extent, we must admit it in a different mode and to a greater extent. There is no limit to the principle. The acknowledgment of the right in any degree, involves a conflict between the Federal Union and the parts of which it is composed. But as the Union is supreme in the exercise of all its powers, including the vital one of borrowing money, no authority can be constitutionally opposed to it while confined to the exercise of those powers. This is a principle which demands the absolute exemption of the national credit from State taxation. Such, I understand to be the doctrine of the Supreme Court of the United States, and as such we are to accept it.

This would be my conclusion if the State of New York had, by its legislation, attempted to subject this class of property to taxation. But I am satisfied that no such attempt has been made. By our statute all lands and all personal estates within this State are made liable to taxation, subject to certain exemptions. (1 R. S., 387, § 1.) The first of those exemptions is of "all property, real or personal, exempted from taxation

The People v. Commissioners of Taxes and Assessments.

by the Constitution of this State, or under the Constitution of the United States." (§ 4.) The force of this exemption should be carefully considered. We have seen that these public stocks cannot be assessed in the mode of enumeration or specification; all such attempts being repugnant to the Constitution of the United States. Now if the exemption declared by the statute, in the words just quoted, could be understood as referring to that particular mode of assessment, they most clearly would not of themselves prohibit the administrative or taxing officers from rating an individual in a sum equal to the value of all his personal estate without any deduction for government stock which he might own. On that supposition, the only question would be one of power in the State Government, which has been considered. But the words of the statute can have no such reference, and admit of no such interpretation; because there is no such mode of assessment in this State. Our laws of assessment contain no specification of the subjects of taxation. They provide for a valuation of the estate of the taxpayer in mass, of whatsoever it may consist, and consequently if he owns anything which is exempted by law, its value must be deducted from the value of the mass. It is the same thing as to say that property not exempt, and no other, is to be valued and taxed. Every exception contained in the statute of things from taxation, and there is a considerable number of them, necessarily refers to the actual system of taxation in the mass, for we have no other; and all such exceptions are to be interpreted accordingly. The conclusion is plain. The Constitution of the United States, according to its true interpretation, exempts the national credit from taxation by State power, and the prohibition has the same force and effect as if it were declared in express words. The legislature of this State, in providing for taxation of personal estate of its citizens in the mass and according to value, has expressly excepted whatsoever is exempt under and according to the Federal Constitution. Putting aside then the question of power, whether it would be possible to evade the Constitution by that mode of assessment, the legislature have declared, in a

The People v. Commissioners of Taxes and Assessments.

manner too plain to be mistaken, that no such evasion is intended. They have provided for aggregate or gross valuations of property, excepting therefrom such things as are exempt, and they have declared in general or particular terms what those things are. It is a necessary result that those things are to be omitted in such valuation.

This conclusion may, perhaps, be rendered still more evident, if we observe that the national Constitution exempts nothing from taxation by any express words of that instrument. Our legislature, therefore, in making the exception of which we are speaking, refer to property which is exempted not by any express language, but "under," or according to the Constitution; and there is no room to doubt that they had in view the very class of property now in question, because at that time, the Constitution had been interpreted in this respect, and the right of exemption ascertained and declared by the judicial power of the Federal Government.

In order to be fully understood on this point, I observe once more: The credit of the United States Government is admitted to be exempt from taxation in the States; but the suggestion is made that this applies only to taxation *eo nomine*, or by enumeration and specification of the thing itself, a suggestion which leaves the States at liberty to rate their citizens according to the value of their property in mass, and without any deduction of that, which is thus exempt. Our own legislation is fatal to this argument, because under our statutes all taxation is according to this mode; and those very statutes declare that whatever is exempt under the national Constitution, shall not be included in the valuation. The exemption, therefore, of the stocks of the United States Government, rests not only upon the want of power in the State, but upon the intention of its legislature.

I come now to a supposed distinction unfavorable to corporations, in this State, which may own the kind of property now in question. The very able and discriminating counsel who has argued this case for the respondents, has relied mainly on that distinction. Feeling, I presume, the force of the considerations

The People v. Commissioners of Taxes and Assessments.

which have been urged, he has scarcely denied that if Government stocks, owned by an individual, had been included in an assessment against him, a correction of the roll could be rightfully demanded; but he has insisted that no such correction can be claimed by a corporation. This result is claimed to flow from the manner in which our assessment rolls are made up, and corporations are rated under our statutes.

For myself, I feel very little difficulty in this branch of the case. In the first place, if it has been shown that stocks of the United States Government cannot be subjected to taxation, when owned by an individual, the rule is manifestly the same when they are held by a corporation. The rule is the exemption of the thing or subject, and it has no respect to the ownership. There is not one interpretation of the Federal Constitution when an individual claims exemption under it, and another, when a corporation makes the same claim. The suggestion has been made, that the legislature may tax corporations in any mode, and to any extent, as the price of the privileges and franchises conferred in their charters. This is true, as to all subjects to which the taxing power of the State extends. But when a corporation acquires property which is absolutely exempt from all burdens imposed by the States, under the higher authority of the Constitution of the United States, by inevitable logic such property is acquired and held free from taxation. In this State, all taxation is upon property. It is the same thing in substance to say that it is upon the owner in respect to property. If the holder of Government stocks is charged because he buys and owns them as a part of his wealth, to the extent of such charge their value in market is depreciated and the credit of the Nation is taxed, and it becomes perfectly indifferent whether a natural or an artificial person is the proprietor. The exemption, if it exists at all, is the result of a constitutional principle which operates in all circumstances, and follows the property wherever it goes. So, too, the law of this State is of universal application. The language of the statute is that "all lands and all personal estate within this State, whether owned by individuals or corporations,

The People v. Commissioners of Taxes and Assessments.

shall be liable to taxation," subject to certain exemptions afterwards specified; and among those exemptions as we have seen, is the one which includes stocks of the United States. If this language does not apply the same rule of taxation and exemption both to individuals and corporations, I greatly misapprehend its meaning.

The subject is, however, perhaps somewhat obscured by the statutes which regulate the mode and details of assessing corporations. By the Revised Statutes, the assessors are directed to enter upon the rolls the names of corporations, and under each name the amount of capital stock paid in and secured to be paid. The quantity and value of real estate are to be entered in the second and third columns. In the fourth column, they are directed to insert the amount of capital stock paid in, and secured to be paid in, deducting the sums invested in the real estate, and the amount of the stock held by the State, or by literary and charitable institutions. (1 R. S., p. 415, § 6.) In the fifth column, of what is called the corrected assessment roll, the actual amount of the tax imposed is to be extended (*id.*, § 15), but how that amount was to be determined, that is to say whether by the real or nominal amount of capital, was not expressly directed in the Revised Statutes. In 1853 those statutes were so amended as to bring within the influence of taxation the surplus profits or reserved funds of corporations, exceeding ten per cent of their capital stock, and, also, so as to authorize a commutation of taxes in the case and manner particularly set forth. (Laws of 1853, ch. 654, p. 1240.) In 1857 an act was passed which, after repealing in the first section all antecedent statutes which authorized a commutation of taxes, and amending in the second section the previous provision as to the fifth column of the assessment roll, proceeds in the third section to declare, that "the capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment roll, or as shall have been exempted by law, together with its surplus profits or reserved funds exceeding ten per cent of its capital after deducting the assessed value of its real estate, and all shares of stock in other

corporations actually owned by such company which are taxable upon their capital stock under the laws of this State, shall be assessed at its actual value, and taxed in the same manner as other real and personal estate in the county." It is said that prior to this act of 1857, corporations were to be taxed according to the nominal and not the real value of their capital or stock; and this it is supposed, in some degree, favors the views of the respondents in this case. The argument, if I understand it, is, that according to this rule of taxation, the assessors or tax commissioners were to consider nothing but the sum of the capital subscribed and paid or secured (until surplus profits were included in 1853), and could not inquire as to the things in which the capital was invested, so as to ascertain the real value of the corporate estate, or whether any part of it was exempted from taxation.

It appears to me that this argument is plainly fallacious. The Code of taxation in the Revised Statutes begins with declaring the real and personal estate both of individuals and corporations to be liable to taxation, subject to certain exemptions, and it then declares the exemptions applicable alike to both. In the subsequent titles, the mode and details of assessment are considered and provided for, while the exemptions are not again referred to. But these must be understood as qualifying the entire Code. Thus, in the case of individuals, the mode of making up the assessment rolls is prescribed, and it is directed that "the full value of all personal estate" shall be entered in the fourth column. (1 R. S., § 9.) Moreover, in a fifth column, the actual amount of the tax is to be extended by the board of supervisors. So precisely, as we have just seen, it is in respect to corporations. The original capital stock is to be set down, and the tax is to be extended in the same manner. No one ever supposed that the prescribed mode and form of assessing an individual could deprive him of the exemptions antecedently declared in his favor. Why then should the same mode and form of proceeding in the case of a corporation have that effect? I am sure this argument rests upon no foundation. If it be said there is no authority in the

The People v. Commissioners of Taxes and Assessments.

statutes for correcting the roll in this respect in favor of the taxpayer belonging to one class, it is equally true as to the other class. And by proving too much, the argument is demonstrated to be unsound.

Aside from all questions of exemption, it is not now very material to inquire whether before the act of 1857 the nominal instead of the real value of the capital or stock of a corporation was the standard, and the only standard of assessment.

On this point the statute quoted from the Laws of 1857, leaves no longer any doubt. The leading design of this act was to abrogate the practice of assessing corporations according to nominal values, and to introduce the principle, far more reasonable and just, of taking actual value as the standard. This design was accomplished by the use of language too plain to require comment. That such is the interpretation of the statute has already been determined by this court. (*Dolloway v. The Oswego Starch Factory*, 21 N. Y., 449.)

In applying the principle thus introduced, the assessor must of necessity have or acquire some knowledge of the actual property, funds and estate which corporations possess, as well as of the liabilities against them. These are the circumstances, and the only ones, which can determine the actual value of their capital or stock. If the shares held by individuals are a subject of sale in market, the sales no doubt are evidence of such actual value; and in the absence of other knowledge, the assessors may act upon that basis. But this evidence is often wholly wanting, because, in very many instances, sales of shares are nearly or quite unknown. Again, in instances still more numerous, evidence of this kind will be entirely fallacious. There is no property so liable to gambling and speculation, as stock in corporations. Its value is often unknown to the large body of the holders, because those having leading interests and concerned in the management conceal such value for their own private purposes. Stocks may be, and frequently are, inflated or depressed by those who wish to sell or to buy. They are subject, moreover, to all the vicissitudes of the money market. They go up or down in the full-

The People v. Commissioners of Taxes and Assessments.

ness of expectation and hope of to-day, or in the panic of to-morrow. Actual value is the result to be arrived at, for such are the words of the statute, and the inquiry, therefore, must have a primary regard to the property and estate, which alone impart such value. I have endeavored to show that without this statute of 1857, the argument for the respondents, which rests upon the idea that the sum of the capital subscribed and paid, or secured to be paid, is the sole standard of assessment, fails. But with this statute, which is now a fundamental part of the system of taxation, the very foundation of that argument seems to be removed.

It remains to examine the distinctive theory, upon which the judges of the court below have proceeded in this case. They have conceded that the credit of the United States is universally exempt from taxation. They suggest no mode of assessing such property whether constituting part of the capital of an individual or a corporation. The only ground, therefore, upon which they have been able to sustain the action of the tax commissioners is, that taxation in respect to corporations is not upon their capital or estate, but upon their own stock, as a thing quite distinct from capital. According to this view, the relators have not been assessed in respect to their Government stocks or upon any other property, and have nothing to complain of. This conclusion seems to be derived from the use of the terms "capital stock," in the statutes which prescribe the manner of preparing the assessment rolls.

This theory only needs to be analyzed in order to demonstrate its illusory character. A just conception of the meaning of terms is the first requisite. The word "capital" is unambiguous. It signifies the actual estate, whether in money or property, which is owned by an individual or a corporation. In reference to a corporation, it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses. The corporation as a legal person, is the owner or proprietor of

The People v. Commissioners of Taxes and Assessments.

this capital, and there is not a corporation aggregate in the world which ever owned any else except the franchise of being a corporation. The term "stock" is, perhaps, sometimes used with less precision. It may occasionally be employed to denote the same thing as capital. If that were its meaning in the statutes, of course the argument of the Supreme Court in this case would not have even a verbal criticism to rest upon. But, whenever it means anything different from the capital of a corporation, it can refer to nothing else than the interests of the shareholders or individuals. Such interests are called "stock," and the sum total of them is appropriately enough called the "stock" of a corporation. Those interests are the resulting estates of private persons, which flow from the nature of corporate organizations. In some respects, they resemble a chose in action, and thus are so treated in the relation of husband and wife and in other relations. More accurately, I think, they may be called equitable estates, which entitle the holders to share in the income of the capital, which is legally vested in and managed by the corporate body. The material point now is, that corporations themselves never own what is sometimes called their own stock. They have the power and capacity to create and issue stock, but when created and issued it always belongs to the individual to whom it is issued, or to his assignee. In his hands it may or may not be subject to taxation, like other private property in the pleasure of the legislature. In this State such property is exempted by law, because the capital itself held by corporations is assessed and taxed. In saying that corporations never own their own stock, of course I mean that which has been subscribed and paid for or secured to be paid by the shareholders. The capacity which a corporation has within its charter of receiving subscriptions and payment for stock, and then issuing it to the individual who subscribes and pays is a species of valuable right. But this is not material, because the laws of assessment only speak of capital or stock, or capital stock which has been paid or secured; and stock in that condition can never, in the nature of things, be owned by a corporation.

The result of this upon taxation is plain. Property is taxed according to our laws, and the owners are assessed in respect to it. Corporations are not to be assessed in respect to their stock as something distinct from their capital, because in that sense they are not the owners of it. They contribute to the public burdens on the basis of their capital like the owners of private estates, and because they have nothing else which is the subject of taxation. The mode of ascertaining the value of such capital in the assessment rolls is indifferent to the question. The sum of the stock subscribed and paid, for or secured to be paid, may or may not be taken as the presumptive value. In whatever way the result is reached, the burden is imposed on the artificial person or body in respect to the capital or estate of which it is the proprietor, and it is not imposed on the intangible substance called "stock," which is parceled out to individual owners. That this is in accordance with all the principles and analogies of taxation known to our laws, it needs no argument to prove.

Plain as I think this conclusion is, the question is not exhausted without looking at the statutes under which it is supposed to arise. Let us refer to them, keeping in view the theory we are endeavoring to refute, which is, that stock—as meaning something wholly different from the capital or estate of a corporation—is the subject of taxation. The subjects of taxation and those which are exempt from it are precisely defined in the title which preceeds all others in the Code of assessment laws. (1 R. S., 387.) In the very first section it is provided, that "all lands and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation," &c. Can language more explicitly declare, that it is the capital or estate of corporations which the legislature intended, and not their stock in the sense now contended for? In the 4th section of the same title, the exemptions are specified, and among them (sub. 4) the houses, lands and personal estate of companies incorporated for the reformation of offenders, and (sub. 7), "the personal estate of every incorporated company not made liable to taxation on its capital in the 4th title

The People v. Commissioners of Taxes and Assessments.

of this chapter." Now it is this 4th title which contains the provisions for making up assessment rolls against corporations in some of which the term "capital stock" is used. The reference to that title here quoted, and the use of the word "capital" in such reference, prove absolutely that the terms "capital," and "capital stock," are employed in precisely the same sense. Referring now again to the first title, we find a further provision (§ 7), excepting "the owner or holder of stock in any incorporated company liable to taxation on its capital." Here, again, the subject is clearly defined. Stock is not to be taxed but capital is; the one is marked as the property of the individual, the other as that of the corporation.

Passing the second and third titles which relate to the assessment and collection of taxes against individuals, and to subjects connected therewith, we come to the 4th, which relates to corporations. (1 R. S., 414.) In the very first section, we find it declared that corporations shall be liable to taxation on their capital in the manner hereinafter prescribed. The grounds for a verbal criticism, slight as they are, would not exist at all, but for the 6th section which, as we have seen, relates to the assessment rolls. But the very first requirement of that section is, that the assessors shall enter the names of corporations, and the "*property*" of each in the manner specified, and the first specification is the "capital stock paid in or secured to be paid in." Again, the 10th section of the same title declares that the "capital stock" shall be assessed, &c., unless the corporation shall be entitled to commute its taxes, in which case no tax shall be imposed on the "*property*" of such corporation. Thus we find the word "capital," "capital stock," and "property," indiscriminately used throughout this title to designate the estate of a corporation. It may well be, that before the act of 1857 such estate was to be taken at its nominal value; that is to say, estimated at the amount of capital originally subscribed and paid or secured, without regard to depreciation and loss. This is indifferent, as we have shown. The point of the discussion now is, that the estate or capital at

The People v. Commissioners of Taxes and Assessments.

whatever valuation, and not the stock in the sense of that term contended for, is the subject dealt with by the assessment laws. Indeed, we may take the very words on which the criticism arises, "capital stock paid or secured to be paid in." I affirm that these words are descriptive of nothing else than capital. The sums subscribed and paid in, or secured to be paid in, are the capital of a corporation in the real and actual sense. Stock, on the other hand, is paid for and is not "paid in." It is the thing which the subscriber receives in exchange for what he pays in. One of those values, that is the sum paid, is held by the corporation and becomes its capital. The other is given to the shareholder and becomes his stock. They are of totally different natures. The one is the object of taxation, the other is not. This appears to me so plain in reason, and upon the language of all the statutes referred to, that I pursue this point no further.

A single additional observation ought to be made upon the act of 1857. That statute besides introducing, as we have seen, the principle of actual value as the basis of taxation, has declared in express words an exemption of whatever is exempted by other laws, in addition to the exceptions which are made in the assessment rolls. This clause was intended, out of abundant caution, to remove all the differences which could be imagined or suggested between the rules of taxation, as to individuals, and those in respect to corporations. The language necessarily refers to all property which was exempt under preëxisting statutes. It cannot refer to the stock of the corporation, held "by the State or by literary and charitable institutions," because that exception is made in the assessment rolls. In addition to this exception, we have the words "or as shall have been exempted by law," referring certainly to all laws exempting property from taxation. In those laws we find embraced stocks of the Government of the United States; and the right to hold them free from taxation would seem more plain in favor of a corporation than an individual, because the privilege is declared twice, instead of once only.

Hoyt v. The Commissioners of Taxes.

The judgment should be reversed, and the proceedings remitted, with a direction to correct the assessment roll.

DAVIES, J., did not hear the argument, and expressed no opinion.

Judgment affirmed.

38	224
113	181
23	224
127	86
23	224
137	84
23	224
141	121
23	224
145	242

THE PEOPLE, *ex rel.* HOYT, v. THE COMMISSIONERS OF TAXES.

Under the statutes of this State relating to taxation, the personal property of a resident actually situated in another State or country is not to be included in the assessment against him. On the other hand, the personal property of a non-resident, which is situated here, is liable to taxation with such exceptions only as the statute laws have made.

But these rules apply only to property which is capable of having an actual *situs*, and has one within or without the State. Property merely in transit through the State is not taxable. Debts and choses in action in general follow the domicile of the owner. Ships at sea, if registered at a port within the State, have no *situs* elsewhere, and are to be assessed here.

The relator, residing in the city of New York, was assessed in respect to capital invested in business in New Orleans, and in respect to chattels upon his farm in New Jersey: *Held*, that the assessment was erroneous.

APPEAL from the Supreme Court. Upon a *certiorari* to the Commissioners of Taxes and Assessments for the city and county of New York, they made a return from which these facts appeared: The relator was assessed \$4,000 for personal property. He applied for a correction of the assessment, and testified that the value of all his personal property within this State was exceeded in amount by his just debts and liabilities. He also stated that he had personal property outside of this State, of the value of \$4,000 over and above his debts and liabilities. The commissioners thereupon declined to correct the assessment. They, however, requested the relator to submit a written statement of his demand, and of the facts upon which it was based. In compliance with this request, he presented an affidavit showing that he was a merchant having his

Hoyt v. The Commissioners of Taxes.

principal place of business in the city of New Orleans, and having an office in New York, where he resided, only for the purchase of goods. He reiterated his previous statement that his personal property within this State did not exceed the amount of his debts, and declared that he had no other personal property except capital employed in his business in New Orleans, "which is taxed and taxable there, and farm stock and household furniture in the State of New Jersey, which are taxable by the laws of said State of New Jersey." The commissioners decided that personal property has no *situs*, but follows the person, and "therefore denied his application for remission, notwithstanding that the goods and chattels owned by him are in the city of New Orleans, and without the State of New York." The assessment was adjudged valid, and affirmed, at general term in the first district, and an appeal was taken to this court.

Grosvenor P. Lowrey, for the appellants.

Greene C. Bronson, for the respondent.

COMSTOCK, Ch. J. The legislature, in defining property which is liable to taxation, have used the following language: "All lands and all personal estate *within this State*, whether owned by individuals or corporations, shall be liable to taxation subject to the exemptions hereinafter specified." (1 R. S., 387, § 1.) The title of the act in which this provision is contained, is, "of the property liable to taxation," and it is in this title that we ought to look for controlling definitions on the subject. Other enactments relate to the details of the system of taxation, to the mode of imposing and collecting the public burdens, and not to the property or subject upon which it is imposed. In order, therefore, to determine the question now before us, the primary requisite is to interpret justly and fairly the language above quoted.

"All lands and all personal estate within this State shall be liable to taxation." If we are willing to take this language,

Hoyt v. The Commissioners of Taxes.

without attempting to obscure it by introducing a legal fiction as to the *situs* of personal estate, its meaning would seem to be plain. Lands and personal property having an actual situation within the State are taxable, and by a necessary implication no other property can be taxed. I know not in what language more appropriate or exact, the idea could have been expressed. Real and personal estate are included in precisely the same form of expression. Both are mentioned as being within the State. It is conceded that lands lying in another State or country, cannot be taxed against the owner resident here, and no one ever supposed the contrary. Yet it is claimed that goods and chattels situated in Louisiana, or in France, can be so taxed. The legislature I suppose could make this distinction, but that they have not made it, in the language of the statute is perfectly clear. Nor is the reason apparent why such a distinction should be made. Lands have an actual *situs*, which of course is immovable. Chattels also have an actual *situs*, although they can be moved from one place to another. Both are equally protected by the laws of the State or sovereignty in which they are situated, and both are chargeable there with public burdens, according to all just principles of taxation. A purely poll tax has no respect to property. We have no such tax. With us taxation is upon property, and so it is in all the States of the Union. So also in general, it is in all countries. The logical result is, that the tax is incurred within the jurisdiction and under the laws of the country where it is situated. If we say that taxation is on the person in respect to the property, we are still without a reason for assessing the owner resident here, in respect to one part of his estate situated elsewhere, and not in respect to another part. Both, I repeat, are the subjects of taxation in the foreign jurisdiction. If then the owner ought to be subjected to a double burden as to one, why not as to the other also?

I find then no room for interpretation, if we take the words of the statute in their plain ordinary sense. The legislative definition of taxable property, refers in that sense to the actual *situs* of personal not less than real estate. If the intention

Hoyt v. The Commissioners of Taxes.

had been different, it cannot be doubted that different language would have been used. It would have been so easy and so natural to have declared that all lands within this State, and all personal property wherever situated, owned by residents of this State, shall be liable to taxation, that we should have expected just such a declaration, if such had been the meaning of the law-making power. To me, it is evident that the legislature were not enunciating a legal fiction which, as we shall presently see, expresses a rule of law in some circumstances and relations, but which in others is not the law. They were speaking in plain words, and to the plain understanding of men in general. When they said all real and all personal estate within this State, I see no room for a serious doubt that they intended property actually within the State wherever the owner might reside. ✓

It is said, however, that personal estate by a fiction of law has no *situs* away from the person or residence of the owner, ✓ and is always deemed to be present with him at the place of his domicile. The right to tax the relator's property situated in New Orleans and New Jersey, rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The necessary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign State. On the same ground, if we are to have harmonious rules of law, we ought to relinquish the administration of the effects of a person resident and dying abroad, although the claims of domestic creditors may require such administration. So, in the case of the bankruptcy of such a person, we should at once send abroad his effects, and cannot consistently retain them to satisfy the claims of our own citizens. Again, we ought not to have laws for attaching the personal

Hoyt v. The Commissioners of Taxes.

estate of non-residents, because such laws necessarily assume that it has a *situs* entirely distinct from the owner's domicile. Yet we do in certain cases, administer upon goods and chattels of a foreign decedent; we refuse to give up the effects of a bankrupt until creditors here are paid; and we have laws of attachment against the effects of non-resident debtors. These, and other illustrations which might be mentioned, demonstrate that the fiction or maxim *mobilia personam sequuntur* is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice so require. In other circumstances the truth and not the fiction affords, as it plainly ought to afford, the rule of action. The proper use of legal fictions is to prevent injustice, according to the maxim, *in fitione juris semper æquitas existat*. "No fiction," says Blackstone, "shall extend to work an injury; its proper operation being to prevent a mischief or remedy an inconvenience, which might result from the general rule of law." So Judge STORY, referring to the *situs* of goods and chattels, observes: "The general doctrine is not controverted, that although movables are for many purposes to be deemed to have no *situs*, except that of the domicile of the owner, yet this being but a legal fiction it yields whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined." He adds quite pertinently, I think, to the present question, "a nation within whose territory any personal property is actually situated; has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situated there." (Conf. of Laws, § 550.) I can think of no more just and appropriate exercise of the sovereignty of a State or nation over property, situated within it and protected by its laws, than to compel it to contribute toward the maintenance of government and law.

Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the

Hoyt v. The Commissioners of Taxes.

property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule. If then proceeding on the true principles of taxation, we subject to its burdens all goods and chattels actually within our jurisdiction, without regard to the owner's domicil, it must be understood that the same rule prevails everywhere. If we also proceed on the opposite rule, and impose the tax on account of the domicil, without regard to the actual *situs*, while the same property is taxed in another sovereignty by reason of its *situs* there, we necessarily subject the citizen to a double burden of taxation. For this no sound reason can be given. To put a strong case. The owner of a southern plantation with his thousand slaves upon it, may prefer to reside and spend his income in New York. Our laws protect him in his person as a citizen of the State, and for this the State receives a sufficient consideration without taxing the capital which it does not protect. Under our laws can we tax the wealth thus invested in slave property? They ignore, on the contrary, the very existence of such property, and therefore there is no room for the fiction according to which, and only according to which, the *situs* is supposed to be here. But if we could make room for that fiction, still it remains to be shown that some rule of reason or principle of equity can be urged in favor of such taxation. This cannot be shown, and the attempt has not been made.

We may reverse the illustration. A citizen and resident of Massachusetts may own a farm in one of the counties of this State, and large wealth belonging to him may be invested in cattle, in sheep or horses which graze the fields, and are visible to the eyes of the taxing power. Now these goods and chattels have an actual *situs*, as distinctly so as the farm itself. Putting the inquiry then with reference to both, are they "real estate and personal estate *within this State*," so as to be subject to

Hoyt v. The Commissioners of Taxes.

taxation under that definition? It seems to me but one answer can be given this question, and that answer must be according to the actual truth of the case. If we take the fiction instead of the truth, then the *situs* of these chattels is in Massachusetts, and they are not within this State. The statute means one thing or the other. It cannot have double and inconsistent interpretations. And as this is impossible so we cannot, under and according to the statute, tax the citizen of Massachusetts in respect to his chattels here, and at the same time tax the citizen of New York in respect to his chattels having an actual *situs* there. In both cases the property must be "within this State," or there is no right to tax it at all. It cannot be true in fact, if a Massachusetts man owns two spans of horses, one of which draws his carriage at home and the other is kept on his farm here, that both are within the State. It cannot be true by any legal intendment, because the same intendment which locates one of them here, must locate the other abroad and beyond the taxing power. It seems to follow then inevitably that before we can uphold the tax which has been imposed upon the relator's property situated in New Orleans and New Jersey, we must first determine, that if he resided there, and the same goods and chattels were located here, they could not be taxed as being within the State. Such a determination I am satisfied would contravene the plain letter of the statute as well as all sound principles underlying the subject.

✓ We have been referred to other provisions of the code of taxation as contained in the Revised Statutes. In the article "of the place in which property is to be taxed," it is declared that "every person shall be assessed in the town or ward where he resides when the assessment is made, for all personal estate owned by him, including all such personal estate in his possession or under his control, as master, guardian, executor or administrator; and in no case shall property so held under either of those trusts, be assessed against any other person." (§ 5, p. 389.) This provision, it is supposed, has some tendency to sustain the action of the Commissioners of Taxes in the present case. But I think otherwise. The object of the title.

Hoyt v. The Commissioners of Taxes.

and of this section in particular, is to specify the town or ward where the property of each taxpayer is to be assessed, and not to define the subjects of taxation. In regard to subjects, therefore, exactness of expression in such a connection, was not important. All property liable to taxation, and all property exempt therefrom, had been specified with great precision in the preceding article, and the definitions of that article must therefore be understood as qualifying all loose and general expressions in the provisions which follow it, devoted to other details of assessment and taxation. In construing the section last quoted, we shall be materially aided if we refer to those which immediately precede it in the same article concerning the assessment of lands. Lands occupied by the owner or wholly unoccupied, and situated in the ward where he resides, must be assessed to such owner. (§ 1.) Lands unoccupied and not owned by a person residing in the town or ward where they are situated, are to be assessed as non-resident lands. (§ 3.) Thus if a person resides in one town, and owns lands in another town or county within the State, those lands are called "non-resident," and are assessed accordingly. But personal estate is reached in a different manner. It is never treated as "non-resident" estate. The owner may reside in one part of the State and his goods and chattels be situated in another part. In such case they are assessed to him, and not as non-resident, unless in the possession or control of a trustee, guardian, &c., at the place of their actual location, and in that case they must be assessed to such trustee, guardian, &c. Thus we find that in assessing residents in respect to their lands, the same must be situated in the town or ward where they reside. But in respect to personal estate, it may have a *situs* anywhere in the State, and the owner is to be taxed for it in the town or ward where he is a resident. It is this difference which led to greater generality of expression in the 5th section. But this generality, thus introduced, ought not to be received as enlarging the sphere of taxation in opposition to a clear and precise definition in the article on that subject. Indeed, if we are to take expressions of a loose and general nature, we shall find

Meyt v. The Commissioners of Taxes.

nothing against taxing lands situated without the State, except the primary definition referred to, which necessarily qualifies all such expressions.

But a still closer attention to this 5th section, will not be unprofitable. Personal estate owned by the taxpayer and that possessed or controlled by him as trustee, guardian, &c., are placed in the same category; and in regard to the latter if it is declared that property so held shall not be assessed against any other person. Now it may well be true, and no doubt is often true, that a person domiciled in this State is trustee, guardian or administrator in respect to property situated in some other State, according to the laws of which the trust will be controlled or the property administered. It is pertinent to inquire whether the legislature intended to tax property thus situated. It "shall not be assessed against any other person." This prohibition would be impossible and absurd, in the case supposed of chattels having a *situs* in another jurisdiction. Yet the prohibition relates to the very thing which is the subject of the assessment. And from this I think it a very just inference that the legislature in enacting the section had in view only personal estate within this State; in other words, the property which they had previously declared to be liable to taxation. Again, I have observed that personal property is not in any case taxed as "non-resident" estate. But it does not follow that such property may not be assessed here, although the true owner resides elsewhere. The possession of chattels is never vacant, as may be the case in respect to lands. Where it is not in the hands of the owner it is usually held by some one else under some agency or trust, and the statutes which have been referred to are comprehensive enough to reach it in most cases when actually situated here, notwithstanding the foreign domicile of the general owner. All personal estate within the State is liable to taxation. It may be within the State in the possession or under the control of a trustee, while the beneficial owner is a resident abroad, and in such a case the assessment is to be against the person having the special interest or control. The actual *situs* and control of the property within the

Hoyt v. The Commissioners of Taxes.

State is the condition which subjects it to taxation. The owner will of course be assessed if he resides here and has it under his own control. If he resides in another State, the result is reached by charging his agent or trustee in the actual possession. And thus the different provisions of law which have been mentioned, appear to me to be in harmony with each other.

We have referred so far to the Revised Statutes of 1830, in which the tax laws underwent a careful revision. But the course of legislation before and since that time should also be considered. As to antecedent laws from 1801 to 1830, it is sufficient to observe, in general terms, that they contained no explicit declaration on the question now before us. In all these acts general words were used, requiring the assessors to set down in the tax roll, against the names of every resident of the towns and wards within the State, the value of his personal estate without any specification of the *situs*. (2 R. L., 509.) Such general language might or might not be held to include the property of residents situated in foreign jurisdictions. In the revision of 1830, we find, for the first time, the precise definitions on this subject, which have been mentioned; and I have no doubt they were framed with a distinct and intelligent purpose.

But we find acts of a later date which throw much additional light upon the legislative intention. In 1851, the above mentioned 5th section of the article relating to the place of taxation was amended. (Stat., ch. 176, p. 332.) By this amendment, the word "agent" is inserted before the words trustee, guardian, &c., and an addition is made to the section which provides, first, for the case of a residence of a person in two or more towns or wards during any year for which taxes are to be levied. The amendment then declares, that the products of any State of the United States consigned to agents in any town or ward of this State, for sale on commission for the benefit of the owner thereof, shall not be assessed to such agent, nor shall agents of moneyed corporations or capitalists be liable to taxation under this section for any moneys in their possession or under their control, transmitted to them for the purpose

Hoyt v. The Commissioners of Taxes.

of investment or otherwise. This amendment is quite material to the present question, because it clearly shows that an actual *situs* within the State is the criterion of taxation. It shows this because it specially exempts the property of citizens of other States having such a *situs* here under peculiar circumstances and conditions. If sent for sale on commission, or if it be the money of a corporation or capitalist sent here to be invested, for example, on bond and mortgage, it is not to be assessed. By irresistible inference, which no one will question, an actual situation here, under all other circumstances, will subject personal estate to taxation, in whatever State or country the owner may have his domicile.

One other act of a still later date remains to be noticed. In 1855, a statute was passed declaring that "all persons and associations doing business in the State of New York as merchants, bankers or otherwise, as principals or partners, whether special or otherwise, and not residents of this State, shall be assessed on all sums invested in any manner in said business, the same as if they were residents of this State, and said taxes shall be collected from the property of the firms, persons or associations, to which they severally belong." (Stat., 1855, ch. 37, p. 44.) It is well known that in many instances persons having their mercantile or banking establishments in the city of New York, reside in the vicinity beyond the lines of the State, and until this act was passed such cases were apparently not within the reach of taxation. There was no authority for inserting in the tax rolls any name but that of the owner of personal estate, resident in the town or ward where the assessment was to be made; including however in the term owner, agents and trustees having the possession or control of the property, whether the true owner resided within or without this State. If, therefore, the owner resided across the line, in New Jersey, but yet controlled and managed his own business in the city of New York, there was no mode provided for taxing his assets there situated. He could not be personally assessed because he was not an inhabitant of the town or ward, and inasmuch as his property was not in the possession

Hoyt v. The Commissioners of Taxes.

or control of any agent or trustee, it could not be reached at all. This was a very considerable mischief, and this statute was passed to remedy it. It accomplished the object by authorizing an assessment by name of the non-resident owner in respect to property thus situated; and undoubtedly large values are thus reached by the taxing power not embraced in the phraseology of the preëxisting enactments. Now this act is referred to in the decision of the court below in the present case, as introducing for the first time the principle of taxing personal estate by reason of its actual *situs* here, when the owner resides abroad. I think it is now plain that this is far from being the case. That principle is inherent in the very nature of the subject, and it pervades all legislation from 1880 to the present time. This act was passed not to change the fundamental basis of assessment, but simply to remedy an imperfection in one of its details by reason of which the system rendered an incomplete result. In short, the system was perfected instead of being inaugurated by this statute.

Let us now take in, at a single view, all the legislation of the State which constitutes the existing code on this subject. We have, in the first place, the fundamental definition which is the basis of all taxation, describing the subject as "all real and all personal estate within this State." The same revisers and legislators who thus defined the basis, prescribed the mode of assessment. Every owner of personal estate was to be assessed in the town or ward where he resided, but this alone would not embrace the case of a non-resident, whose property was within the State. But there is no such thing as a vacant possession of personal estate. Therefore, the term owner was made to include trustees, guardians, &c., and they were to be assessed for property in their possession or under their control, whoever and wherever the beneficial owner might be. In that mode, the estates of non-residents having a *situs* here were reached. But it was at least doubtful whether the terms trustee, guardian, &c., were sufficiently descriptive to include property of non-residents situated here, under all conditions which ought to subject it to taxation. The more com-

Hoyt v. The Commissioners of Taxes.

prehensive word "agent," therefore, was added in 1851; but in order that this word might not carry the principle to results unjust and inexpedient, the legislature with becoming caution made at the same time a special exception in favor of property and money sent here from other States for sale or investment. The very language of the exception was an unmistakable assertion of the principle. Then in 1855, a serious defect in the system had been developed. Non-residents of the State were found to be personally, either as principals or partners, in the possession and management of large capitals or estates within the State. They could not be assessed, as the laws were, and there was no agent or trustee to assess in respect to property thus situated. The system was accordingly improved and extended so as to embrace such cases.

Thus we have a system apparently symmetrical and complete, according to which all personal estate having an actual *situs* in this State is brought within the sphere of taxation without regard to the domicile of the owner, with only special exceptions dictated by policy and justice. And if this be the rule of taxation where the *situs* of the thing to be taxed, and the domicile of the owner are different, it is conceded that the opposite rule cannot and does not prevail. Proceeding on this rule, Louisiana and New Jersey very justly imposed a share of their public burdens on the property of the relator situated in those States. The State of New York will do the same thing in respect to citizens of those States having property here, but it is not so unjust to its own citizens as to load them with double burdens by proceeding on the opposite principle also. I am confident there is nothing in all our legislation which affords any ground for imputing to it such inconsistency and injustice.

I have not arrived at these views, without examining the case of *Wilson v. The Mayor, &c., of New York*, decided in the Common Pleas of that city in December, 1855. (4 E. D. Smith, 675.) In that case Mr. Justice WOODRUFF showed very satisfactorily, that, according to all principles which ought to govern taxation, personal as well as real estate should be assessed in the place of its actual situation, and not otherwise, and by the same

Hoyt v. The Commissioners of Taxes.

reasoning he thought the property of residents situated abroad ought to be exempted. Nevertheless, he came to the conclusion that the rule was in fact otherwise in both respects. He very properly conceded that the laws of taxation were consistent, resting wholly on one basis or the other, and in no case provided for a double assessment. But adopting in its fullest extent and for all uses the fiction that personal estate has no *situs* away from the owner's domicile, he interpreted the words "within the State," in the light of that fiction; and on that basis derived the double conclusion, that the property of a non-resident could in no case be taxed, while that of a resident is never exempt in whatever part of the world it may be situated. I need not repeat that I am constrained to think differently in both respects. Nothing on this point was determined in that case, because the decision was against the non-resident taxpayer on another ground. In the case now before us the only authority relied upon or cited in the opinion of the court below, is the case of *The New York and New Haven Railroad Company v. Lyon* (16 Barb., 651). I have also examined that decision, and find that it contains not even an allusion to any such question. The assessment in that case was upon land, and the questions involved were of a totally different kind.

I conclude the discussion of this question by a brief reference to the course of decision in other courts of this country. In the case of *The City of New Albany v. Meekin* (3 Ind. R., 481), the charter of the town conferred the right of taxing all real and all personal estate within the city. The defendant was a resident of the city, and was assessed in respect to a steamboat enrolled at Louisville, and which touched only occasionally at New Albany. The action was debt, to recover the amount of the assessment. But it was held that the tax was illegal, and that no recovery could be had. The Supreme Court observed, "the only question we have to consider is, whether the boat, or the defendant's share, is within the city." The same point arose upon a grant of the right of taxation, in the same words, in the case of *Wilkey v. The City of Pekin* (19 Ill. R., 160), and the question was determined in the same way. The

Hoyt v. The Commissioners of Taxes.

court said, "as a general rule personal property follows the person of the owner, but municipal corporations have no power to protect property not within their corporate limits, nor can they render any equivalent for the right of taxing such property, and there is no propriety in the application of this rule to them for the purposes of revenue. It is evident," the court added, "that the legislature intended to confine the power of taxation to property actually within the territorial jurisdiction." In *Johnson v. The City of Lexington* (14 B. Munroe, 648), the city government under its charter had authority to make a list of its taxable inhabitants, and to assess against them their real estate within the city, and also the just and true value of such personal estate as the Mayor, &c., should designate. The Court of Appeals of Kentucky held that this power extended only to personal estate within the city, and that the property referred to was such as had an actual *situs*, and not merely such as had a legal or constructive *status* within the city, and which, they observed, is regarded only "for some purposes as being with its owner where he is domiciled." In *Finley v. The City of Philadelphia* (32 Penn., 381), the plaintiff was a surgeon in the United States army, stationed and keeping house in that city, but without any domiciliary intention. He was assessed in respect to his household furniture, and claimed to be exempt in consequence of his non-residence and occupation. But the Supreme Court decided otherwise; Chief Justice LOWRIE observing, "there is nothing poetical about tax laws. Wherever they find property, they claim a contribution for its protection without any special respect to the owner or his occupation." In *Catlin v. Hull* (21 Verm., 152), a person residing in New York owned personal estate, consisting of notes and other obligations of debtors who were residents of the State of Vermont. These he had deposited with the plaintiff, residing in the town of Orwell in that State, as his agent, for management, collection and investment, and the plaintiff being such agent was assessed in that capacity for the estate thus in his hands. His own property being seized on the warrant for the collection of the tax, he brought trespass for such seizure, and the only ques-

Hoyt v. The Commissioners of Taxes.

tion was, whether the property of the non-resident owner was subject to taxation in that town. The statute of that State, very much like ours, provided that personal estate held in trust by an executor, administrator, agent or trustee, should be assessed to such executor, &c. Among the propositions argued on behalf of the plaintiff it was insisted that personal estate, and especially debts due, having no fixed *situs*, follow the person and are to be considered as situate where his domicil is, and hence that the property in question could not be taxed, because the owner was domiciled out of the State. If such was the intention of the legislature, it was denied that they had the power of taxation in such a case. This argument was carefully considered, and was rejected by the Supreme Court of that State. After referring to and recognizing the fiction insisted on, it was observed by the court: "But this rule is merely a legal fiction, adopted from considerations of general convenience and policy for the benefit of commerce, and to enable persons to dispose of property at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But this doctrine," it was added, "in relation to the *situs* of personal chattels, and their transfer and distribution, we do not consider as at all conflicting with the actual jurisdiction of the State where it is situate, over it, or with the right to subject it, in common with the other property of the State, to share in the burden of government by taxation." And it was further observed, "we are not only satisfied that this method of taxation is well founded in principle and upon authority, but we think it entirely just and equitable, that if persons residing abroad bring their property and invest it in this State for the purpose of deriving profit from its use and employment here, and thus avail themselves of the benefit and advantages of our laws for the protection of their property, their property should yield its due proportion towards the support of the government which thus protects it."

The cases which I have referred to were determined by the highest courts in five States of the Union. They appear to be

Hoyt v. The Commissioners of Taxes.

entirely pertinent to the question now before us, and I am not aware of a single decision to the contrary, except the one under review. These cases not only establish a construction of statutes framed like our own, but they all assert the principles of taxation, which lie at the very foundation of the subject. (See, also, Story's Conf. of Laws, pp. 19, 462.) My conclusion, therefore, derived from the statutes, from these authorities and from the reasons of a general nature which ought to influence the decision of such a question, is that the relator was not subject to taxation for his personal estate, having an actual situation in New Jersey and Louisiana. This conclusion is intended to embrace only property which is visible and tangible, so as to be capable of a *situs* away from the owner or his domicile; and I do not consider the question in reference to personal estate of a different description. It must be within this State in order to be subject to taxation, for so is the statute; but that may be true of choses in action, and obligations for the payment of money due to a creditor resident here, from a debtor whose domicile is in another State. If the securities are separated from the person and domicile of the owner, and are actually in the hands of an agent in another State for collection, investment and reinvestment there, it may be that capital thus situated should be regarded as foreign and not domestic, in the absence of any special statutory provision intended for such a case. Questions of this character need not now be determined. It may be proper to add in respect to chattels which are in transit through the State, that they ought not to be considered as having a *situs* here, so as to be subject to taxation. On the other hand, I have no doubt that ships at sea registered at a port within this State and consequently having no *situs* elsewhere, are justly taxable to the resident owner.

A subordinate question remains to be briefly noticed. It appears from the return of the commissioners of taxes to the *certiorari* in this case, that they gave notice to the relator of the assessment against him pursuant to the statute (Laws of 1859, p. 678), that he appeared before them, and claimed

Hoyt v. The Commissioners of Taxes.

that such assessment be stricken from the roll, the sum at which he was rated being \$4,000. On that occasion he made a statement showing that he had personal estate elsewhere than in this State of the value of \$4,000 over and above all his debts and liabilities; whereupon the commissioners terminated his examination and declined to correct the tax roll. They requested, however, that his statement should be furnished in writing. It was furnished accordingly; and it showed that he had no personal estate within the State of New York over and above his just debts and liabilities, but it admitted that he had capital employed in his business in New Orleans, which was taxed and taxable there, and farm stock and household furniture in New Jersey, which was taxable there. Thereupon, the commissioners found that the relator was a resident of New York, that he owned personal estate of the value of \$4,000; and they determined, as matter of law, that under the act of 1851 (already mentioned), "he was liable to be assessed for all personal estate owned by him, wherever the subject of the same might be, and that personal property has no *situs*, but follows the person."

Such being the action of the tax commissioners, I am of opinion that we are not at liberty to criticise the form or substance of the relator's statement before them. Under the statute (Laws of 1859, p. 681, §10) they were clothed with the most ample powers to examine him in their own way upon oath, and they might, if they pleased to do so, inquire as to any facts bearing upon the merits of his application. But as soon as he admitted that he had personal estate situated out of the State of New York, they terminated the examination and flatly refused to give him the relief he demanded. This was followed by a more formal adjudication that his property situated in other States was subject to taxation, on the ground that in law it had no *situs* away from his person and domicile in New York. This treatment of the subject was a full concession on their part, that if they were wrong in the law, the assessment could not be sustained. They declined a further examination of the facts, and deliberately decided the legal question. Of this

The Parker Mills v. The Commissioners of Taxes.

"business" embraces everything about which a person can be employed; and a sum is "invested" whenever its amount is represented by anything but money. No conclusion can be arrived at in this case, by following out the precise lexicographical meaning of these terms. The statute is to be interpreted, therefore, by the light to be obtained from its general scope and tenor: from other statutes *in pari materia*: and from a consideration of the evils and abuses at which it was aimed.

It was not uncommon, previous to the passage of the act, as the history of our legislation shows, for foreign corporations, particularly insurance companies, to establish agencies in the city of New York, and perhaps elsewhere in this State, for the transaction of their corporate business. These agencies were protected by our laws and carried on a profitable business within this State, and yet contributed nothing towards the expenses of government. They came in direct competition with domestic corporations, which were heavily taxed. It was certainly just and right that they, or the corporations by which they were established, should be made to contribute, to some extent, to the public burdens. But there was also another class of cases which called for special legislation, and which the legislature probably had more directly in view in passing the act of 1855. Many persons, engaged in business in the city of New York as partners of commercial firms or otherwise, resided in New Jersey, Connecticut, or elsewhere out of this State. These persons frequently had large amounts of property in this State, and enjoyed the fruits of a profitable business carried on under the protection of our laws; and yet, by reason of the rule that personal property is deemed to follow the person of the owner, they escaped taxation in respect to this property, at least in this State, and probably in most cases altogether.

There is no doubt that, to provide for these two classes of cases, especially the last, was the main object of the act of 1855. That it was never intended to include a case like the present, seems to me clear. In the two classes of cases referred to, the investment of funds by the non-residents has more or less of

The Parker Mills v. The Commissioners of Taxes.

permanency. It is not the mere transit of property through the State for the purposes of a market, but the funds are used for the prosecution of continuous business. Taxes are levied, for the most part, annually. They are the consideration which property holders pay for the protection which the government and laws afford to them and their property for the year. But, if the commissioners in this case are right, if the property is caught within this State for a single day while the assessors are engaged in the performance of their duties, its owner may be as heavily taxed as if it had been here throughout the entire year.

It is difficult to see any difference in principle between the present case and that of a drover who transports his herds of cattle by railroad to the city of New York for sale; and yet, I apprehend, no one ever supposed the owner of the cattle, if a non-resident, to be taxable in such a case. It may be said that the Parker Mills had a store and an agent in the city of New York. So the drover may have his field or his yard for keeping his cattle, and his herdsman to take care of them. The cases are, I think, parallel; and the reason why the statute does not apply to either is, that there is no sum invested or used for the purpose of carrying on a continuous business in this State.

That it never was the policy of the State to impose taxes upon property sent into the State for the mere purpose of sale, is shown by the course of legislation on this subject. The general tax law provides (1 R. S., 389, § 5) that every person shall be assessed in the town or ward where he resides, for all personal estate owned by him, "including all such personal estate in his possession, or under his control as trustee, guardian, executor," &c. By the amendatory act of April 15, 1851 (Sess. Laws, 1851, ch. 176), agents are added to the class of persons named in the previous statute; but lest the clause, with this addition, should be construed more broadly than the legislature intended, it was further provided that "the products of any State of the United States, consigned to agents in any town or ward in this State for sale on commission for the benefit of the owner thereof, shall not be assessed to such agents."

The Parker Mills v. The Commissioners of Taxes.

The present case does not come strictly within the terms of this exception. The word "products," as here used, means, as I suppose, the natural agricultural products of the country. But I can see no distinction in principle between the present case and the case excepted. In both, the commodity is produced and owned in other States, and is brought temporarily into this State for the mere purposes of a market. Every reason which would lead to exemption from taxation in one case, applies, as I conceive, equally to the other. The exception is to be considered rather as indicative of the scope intended to be given to the principal clause, than as founded upon any reasons specially applicable to the natural products of the country as distinct from other property. It is a case to which the maxim, *expressio unius exclusio est alterius*, does not apply. The exception was undoubtedly inserted, from abundant caution, to prevent a misconstruction of the previous clause, authorizing the taxation of trustees and agents for the property in their hands; and not because the legislature intended to discriminate between the products of agricultural and other kinds of labor. It shows that it was no part of the policy of the legislature, when that act was passed, to compel the citizens of other States to contribute to the support of our government simply because they send a portion of the products of their industry to this State to be sold. It is clear, therefore, that the property of the relators could not have been taxed to their agent under the law of 1851; and I see no reason to suppose that it was intended, by the law of 1855, to adopt a different policy in respect to property so situated. My conclusion, therefore, is, that the judgment of the Supreme Court should be reversed, and that the proceedings should be remitted, with instructions to cause the names of the relator to be erased from the assessment roll, and the corresponding tax to be canceled.

All the judges concurring,

Ordered accordingly.

The People v. Denniston.

THE PEOPLE, *ex rel.* DE FOREST, v. DENNISTON, Comptroller.

A State loan reimbursable at the pleasure of the State after twenty years, has no term of payment until the legislature has fixed it by law.

Where such a loan was made under a law passed before the Constitution of 1846, for the benefit of the Long Island Railroad Company, which was bound to redeem the stock, an act giving to its holders the option of having it made payable in 1876, is not in violation of the constitutional prohibition of the loan of the State credit to corporations.

APPEAL from the judgment at a general term of the Supreme Court in the fourth district, affirming an order of the special term, granting a peremptory mandamus to compel the Comptroller of the State of New York to make an indorsement on certain bonds of the State, loaned to the Long Island Railroad Company.

It was enacted, by chapter 198 of the Laws of 1840, that whenever the Long Island Railroad Company should produce to the Comptroller the joint affidavits of five directors of said Company, that the sum of \$400,000 of the moneys paid in on the capital stock of said company, had been actually expended by them in the construction of their road, he should issue and deliver to the treasurer of said company, special certificates of stock to the amount of \$100,000, bearing an interest not exceeding six per cent, payable semi-annually. This amount was made a lien upon the road in favor of the State, and the money accruing from the sale of the certificates was to be applied to the construction of the road. The company was to pay punctually the interest in such manner as should exonerate the treasury of the State from any advance of money for that purpose; and, also, to pay, on the 1st day of January in each year, to the Comptroller, one per cent on the amount of said stock, to be by him invested as a sinking fund for the redemption of the stock. In case of default in payment of interest or contribution to the sinking fund, the Comptroller was required to sell the road and appurtenances, as therein provided.

The People v. Denniston.

The 7th section of the act was as follows: "§ 7. The said stock shall be reimbursable at the pleasure of the legislature, at any time after twenty years from the date of the respective issues thereof." The certificates issued were all dated July 27th, 1841, bearing interest from August 1st, 1841, reimbursable at the pleasure of the State, at any time after the 1st day of August, 1861.

The interest and the contribution to the sinking fund was duly made as required by the act.

By the Laws of 1858, chapter 36, it is enacted as follows: "§ 1. The stock of the State of New York, issued to the Long Island Railroad Company, in pursuance of the provisions of chapter one hundred and ninety-three of the Laws of said State for the year eighteen hundred and forty, is hereby made payable on the first day of August, eighteen hundred and seventy-six, *provided any party who may hold certificates of such stock, who may desire the same made payable on the said first day of August, eighteen hundred and seventy-six, shall, on or before the first day of January, eighteen hundred and sixty-one, present such certificates to the Comptroller for indorsement, whereupon the Comptroller shall indorse on each of the said certificates the following words, namely, 'The principal of this bond is payable on the first day of August, eighteen hundred and seventy-six, and the rate of interest thereon is to be five per cent per annum, after the first day of August, eighteen hundred and sixty-one, payable semi-annually, as heretofore,' attesting the same by his signature, and stating the date of the act of the legislature authorizing such indorsement.*

"§ 2. Such certificates *as shall not be so presented and indorsed shall be payable* on the first day of August, eighteen hundred and sixty-one, from the funds to the credit of the railroad company then held by the Comptroller, or other additional funds if necessary, to be furnished by said company."

The 3d section provides, that the company shall pay the interest at five per cent on all the certificates so indorsed, and also pay to the Comptroller \$2,000 per annum, to be invested

The People v. Denniston.

by him as a sinking fund for the redemption of the stock so indorsed in lieu of the \$1,000 heretofore annually paid by said company as a sinking fund.

Section 4 provides, that this law shall not release the said railroad company from any liability imposed by the law of 1840, but the provisions and conditions thereof, not herein modified, shall remain in full force and effect.

On or about the 1st day of December, 1860, the Long Island Railroad Company filed with the Comptroller its consent that he should indorse such bonds as should be presented to him for that purpose, and requested the Comptroller to make the indorsement prescribed by the act of 1858.

On the same day the relator, being the owner and holder of one of said bonds, No. 16, presented the same to the defendant, and demanded that he should indorse it pursuant to the act of 1858, which the defendant refused to do on the ground that said act was a nullity.

The relator, upon affidavits, the several acts of the legislature in relation thereto, and on notice of motion, applied to the Supreme Court, at special term, for a writ of mandamus to compel the Comptroller to indorse said stock; and after hearing the motion, the court awarded the peremptory writ, which was accordingly issued.

Charles G. Myers, Attorney-General, for the appellant.

Alonzo C. Paige, for the respondents.

JAMES, J. The ground upon which the Comptroller placed his refusal to do the act required, was, that the act of March, 1858, authorizing it, was in conflict with the 9th section of article VII of the Constitution of this State, and therefore void. That section of the Constitution declares that the credit of the State shall not, in any manner, be given or loaned to or in aid of any individual, association or corporation. The Constitution was adopted in 1846, and by the 17th section of article I, it was declared that such acts of the legislature of the State

The People v. Denniston.

as were then in force, should be and continue the law of the State, subject to such alterations as the legislature should make concerning the same. The operation of the Constitution was therefore wholly prospective.

The Comptroller's refusal rests on the assumption that the act of 1858 was a loaning of the credit of the State to the Long Island Railroad Company, and unless that assumption be correct, he is without excuse.

To determine this question, it is necessary to ascertain the duration of the loan as authorized by the act of 1840. The argument of the Attorney-General is, that by the true construction of the statute, it falls due on the 1st day of August, 1861; that the words "at the pleasure of the legislature," contained in the act, are mere surplusage, and that such has been the uniform construction given to acts containing similar provisions by the State officers. I cannot concur in that construction. In construing a statute, it is the duty of the court, if possible, to give force and effect to every word used, if it can be done without a violation of the organic law. The words employed are to be understood according to their natural signification and import. When the words are plain and clear, and their sense distinct and perfect, there is generally no necessity to resort to any constructive means of interpretation. There is no room for construction. The words themselves declare the meaning of the instrument, and courts have no right to add to, or take away from, that meaning. (3 Seld., 97.) In this case, the words used are plain and clear; they embody a meaning precise and distinct, and that meaning cannot well be misunderstood. Taking the language of the act, and giving to every word its full force, according to its most common and popular signification, the intention of the legislature is plain and clear—it makes the stock reimbursable at the pleasure of the legislature after twenty years from its issue. No other construction can be given to the act, unless a part of its words are omitted. To give it the construction contended for by the defendant, the words "at the pleasure of the legislature at any time after," would have to be erased. I cannot

The People v. Denniston.

think those words were inserted by the legislature without a purpose, and that purpose was, as hereinbefore stated, to vest in the legislature the power to fix the time for the reimbursement of said stock, after a period of twenty years from their issue.

The conclusion of the court below, that the act of 1858 was not a loan of the credit of the State, was therefore correct. The credit of the State had been previously loaned. The stock had a valid existence, its holders were the legal creditors of the State, yet they could not call for its redemption until after the expiration of twenty years from its issue; nor then until the legislature should fix a period for its payment. The statute of 1858 was enacted for that purpose, and it designated two periods when the stock might be redeemed, one present, the other future, leaving the option of accepting the one or the other with the holders of the bonds, if that option was made manifest within the period limited by the act.

Of the power of the legislature to do this, I have no doubt. The whole law-making power is vested in the legislature, which is omnipotent, unless restricted by the express or implied provisions of the Constitution. It is for those who claim that a statute is unconstitutional to show that it is forbidden. The section, which it is claimed prohibited the enactment of 1858, does not reach the case. Had this act simply declared that the bonds in question should become due in 1876, the option being with the legislature, no one would have deemed it a loan of the credit of the State. If it were, fixing any period after the lapse of twenty years from the issue of the bonds, would be equally void; and thus the option vested in the legislature by the act of 1840, entirely defeated. Fixing two periods instead of one for the redemption of the bonds, with the conditions given to the holders, did not change the nature of the act, nor render the law for that reason unconstitutional.

It is true, that the original loan, if the holders so elect, may, under the act of 1858, continue fifteen years after the first twenty years have expired, and so it might had not

Fassett v. Smith.

the act of 1858 been passed. The option was with the legislature, and it had the power, either by affirmative or negative acts, to allow the loan to run; and having seen fit to act affirmatively in the matter, the act is not without the limits of the Constitution, nor the law invalid.

I fully agree with the learned Attorney-General that "the whole scope and object of the seventh article of the Constitution was to pay the public debt at the earliest practicable period, and to extricate the State from its liabilities, incurred for the benefit of corporations," and I trust that the object will never be departed from. Although it may be that the legislature in fixing a day so remote for the redemption of these bonds, has acted unwisely, and departed from the intent of the framers of the Constitution, in allowing the credit of the State to be continued for the benefit of the corporation; still the power being vested in that body, its unwise exercise affords no ground for the courts to nullify it.

In my judgment, the act of 1858 was constitutional, and the Comptroller should have indorsed the bonds presented to him for that purpose, as required by the provisions of the act.

The order must be affirmed, with costs.

DAVIES, J., did not hear the argument; all the other judges concurring,

Judgment affirmed.

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145 561

*FASSETT et al. v. SMITH, Receiver of Oliver Lee & Co.'s
Bank of Buffalo, et al.*

The definition in the 2d Revised Statutes, page 702, section 30, of the term 'felony,' when used in a statute, has not so changed the common law as to prevent a purchaser in good faith and for value, obtaining title to goods which the original vendee procured by false pretenses.

The case of *Andrew v. Dieterich* (14 Wend., 36), in this respect overruled. The possession by a husband of his wife's real estate is to be taken as her possession, so as not to put a purchaser upon inquiry as to the rights of

Fessett v. Smith.

a third person of whom the husband, to cover his own fraud, took a lease, unknown to the purchaser.

A creditor who took from his debtor a mortgage declared to be a continuing security for an amount less than the debt held to have made subsequent advances on the faith of the mortgage, although the original indebtedness was never reduced, but was continually increasing.

APPEAL from the Supreme Court. The action was brought for the purpose of setting aside the satisfaction of a mortgage, and to reinstate it as a lien, on the ground that the satisfaction was procured from the plaintiffs, the mortgagees, by the fraud of the mortgagor, Daniel J. Townsend. The mortgage covered a lot of ground situated at Black Rock, in Erie county, on which a steam saw-mill had been erected, which is called, in the pleadings and proofs, the mill property, or mill lots. It was executed by Townsend and his wife to the plaintiffs, the 23d June, 1853, to secure an existing indebtedness and as a continuing security for future advances, to the amount of \$35,000; and it was duly recorded. The plaintiffs had other securities for their demand; the particulars of which it is not material to state, as the indebtedness, before and at the time the bank which the defendant represents as receiver took its lien, was greater than the value of all the securities. In January, 1854, Townsend had become desirous of arranging the securities which the plaintiffs held, in a different manner. He had contracted to sell a part of the mill lot, and proposed to have the mortgage in question and the plaintiffs' other securities discharged, and to give them a new mortgage on the residue of the mill property and on other lands in Erie county, and to assign to them certain stock. The plaintiffs assented to this, and their agent, residing at Buffalo, was authorized to deliver the discharges and receive the substituted securities; the plaintiffs themselves being at Albany, and Townsend at Niagara Falls. Under this authority the agent received the new mortgage and delivered the discharges, one of which was the satisfaction of the mortgage in question, which Townsend caused to be recorded and the mortgage to be satisfied of record. By a fraudulent contrivance of Townsend, this substituted

Fassett v. Smith.

mortgage, which was executed by himself and his wife, did not cover the mill property or any part of it, but was on a vacant lot of much smaller value, which was substituted in its stead—the agent, who was unacquainted with the boundaries, being induced, by the fraudulent representations of Townsend, to believe that the new mortgage did describe the residue of the mill lot according to his agreement. Subsequently, in April, 1855, the plaintiffs and Townsend having adjusted the debt which the securities were given to secure, at about \$50,000, it was agreed to be liquidated by the conveyance of the mortgaged property to the plaintiffs. Townsend and his wife accordingly executed a deed to the plaintiffs of what the former represented, and the latter supposed, to be the residue of the mill lot, but which was the land which had been fraudulently substituted for that lot in the last mortgage, and another deed covering the other property contained in the said last mentioned mortgage, and assigned to them certain stock; and the plaintiffs thereupon released him from the debt. It was parcel of this agreement for the settlement that the plaintiffs should lease to Townsend the mill lot and the other land conveyed to them, for one year, at a rent of \$3,500, payable quarterly; and they accordingly gave him such a lease, and he continued in the possession of the mill lot to the time of the mortgage to the bank. In the latter part of that year (1855), when they were pressing him for the rent, he for the first time disclosed to the plaintiffs the fact that they had no title to the mill property. In truth, it had all along belonged to Townsend's wife; but, as she executed the first mortgage, which really covered it, the plaintiffs had a perfect lien provided they were not precluded by the satisfaction and release.

On the 28th May, 1856, Townsend and his wife mortgaged to the Oliver Lee & Company's Bank (a banking association under the law of 1838,) several parcels of land, including the unsold part of the mill lot mortgaged to the plaintiffs. The mortgage was conditioned to pay all checks, notes, bills, &c., which the bank held, or should hold, against Townsend and the Buffalo Car Company, of which he was president; and at

Fassett v. Smith.

the foot of the instrument it was stated that it was "executed as a continuing security for an amount not exceeding \$93,600." At the date of the mortgage, Townsend was liable to the bank for about the sum of \$145,000. This debt was increased by subsequent loans so that on August 27, 1859, it had risen to over \$281,000. The defendant, the receiver, claimed that the bank was a *bona fide* mortgagor without notice, and it did not appear that its officers had any notice of the circumstances constituting the plaintiffs' equity.

The foregoing facts in substance were found by Mr. Justice HARRIS, before whom the case was tried without a jury. He also stated, as a conclusion of fact, "that the bank had not any actual notice of the fraud practised upon the plaintiffs by Townsend nor of the plaintiffs' rights, and had no other notice thereof than such as arose from the fact that the plaintiffs executed the lease aforesaid to Townsend, and his occupation of the premises." Judgment was rendered at the special term in accordance with the decision of Judge HARRIS, by which it was declared that the satisfaction of the mortgage which the plaintiffs had executed was void on account of having been procured by the fraud of Townsend, and that the said mortgage was a valid incumbrance and superior to the lien of the mortgage executed to the bank; but, on appeal that judgment was reversed, at the general term, and a new trial was ordered. The plaintiffs appealed to this court with the usual stipulation in such cases.

John H. Reynolds, for the appellants.

John Ganson, for the respondents.

JAMES, J. The fraud of Townsend being established as between himself and the plaintiffs, the discharge was a nullity, and the mortgage continued a valid lien upon the premises. Those who obtained liens subsequently from Townsend stood in no better condition than himself, unless they were *bona fide* purchasers, or incumbrancers, for value, without notice; and not then, if Townsend's fraud amounted to a felony.

Fassett v. Smith.

The first position assumed by the plaintiffs' counsel is, that this fraud was a felony by the provisions of the statutes. (2 R. S., 677, § 53; id., 702, § 30.) The section first cited declares that "every person who shall, by any false pretence, obtain the signature of any other person to any written instrument, shall, on conviction thereof, be punished by imprisonment in a state prison, county jail, or by a fine," &c.; and the section secondly cited declares that "the term '*felony*,' when used in this act, or any other statute, shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a state prison."

This question incidentally arose in the case of *Mowrey v. Walsh* (8 Cow., 238), where it was held that the obtaining of money or goods by false pretences, with intent to defraud the owner, was a criminal offence, punishable by imprisonment in a state prison, or county jail, in the discretion of the court. Still, it was not a felony at common law, nor had it been made a felony by statute. This decision was before the adoption of the Revised Statutes containing the section last above cited. The effect of that section of the statute has been several times before the court, and considerable conflict of opinion seems to prevail in regard to it. In *Andrew v. Dieterich* (14 Wend., 36), it was held that this statute had declared all offences which rendered the offenders liable to punishment in a state prison, felonies, and that a fraudulent vendee could no longer transfer a valid title to property thus obtained, even to a *bona fide* purchaser, without notice. In *Peabody v. Fenton* (3 Barb. Ch., 463), the Chancellor doubted whether that view of the operation of that section of the Revised Statutes was correct, but expressed no definite opinion on the subject. In *Robinson v. Dauchy* (3 Barb., 20, 29), the court said "the goods in question were purchased of the plaintiffs under false pretences, amounting to a felony," citing the section of the statute above referred to. Thus stands the question upon authority; and its final determination is one of considerable importance. None of the cases cited give evidence that the question was examined with

Fessett v. Smith.

any considerable degree of care. The section of the statute relied upon is found near the close of a chapter relating to "crimes, and their punishment." It purports to give a statutory definition to the term "felony," when used in the statutes. The other sections of the same chapter, which follow it, define certain other terms. It will, however, be observed that this section does not assume to define the meaning of the term "felony," except when used in a statute, and that this term is not used in the statute relating to false pretences. This section does not declare that every offence punishable in a state prison is a felony, nor does such a conclusion naturally follow from its language. At common law, the term "felony" had a well known and definitive meaning. It was, any offence which occasioned a total forfeiture of lands or goods, or both; to which capital or other punishment might be superadded. (4 Bl. Com., 94; Bouv. Dic., 517.) That term is frequently used in the Revised Statutes (2 R. S., 698); and as all common law punishments for offences specified in those statutes were abolished (*id.*, 701), the term would have been without a distinct and positive meaning had not the section under consideration been inserted. I am of the opinion that the common law rule, as to the character of the crime of obtaining goods, &c., by false pretences, was not changed by the provision of the Revised Statutes above cited.

If, therefore, the bank was a *bona fide* holder for value without notice, its lien is entitled to priority over that of the plaintiffs.

The plaintiffs insist that the bank was not a *bona fide* holder, without notice, upon two grounds:

1st. Because its mortgage was taken as security for a precurrent debt; and,

2d. Because, when the mortgage was taken by the bank, Townsend was in the actual possession by virtue of a lease from the plaintiffs as their tenant, of which the bank and all other persons proposing to acquire any interest in the property from him were bound to take notice at their peril.

Fassett v. Smith.

The facts of the case, I think, conclusively dispose of the first point. It is true that Townsend's indebtedness to the bank, at the date of the mortgage, was \$145,000, and the mortgage only \$98,600: still, the mortgage was given, not only as applicable to that liability, but as a security for such future advances as the bank might thereafter hold against him, and was also declared a continuing guaranty for the amount expressed on its face. Townsend continued to do business with the bank, paying in and drawing out money, so that, when this action was commenced, he was indebted \$281,000. Thus it appears that future advances were made to Townsend by the bank, and it is fair to presume they were made in part on the faith of this additional security; so that, whether or not the prior indebtedness was reduced below the amount by the mortgage secured makes no difference, because the mortgage security being applicable, by its terms, to any indebtedness of Townsend, any advance made upon its faith before notice constituted the bank a holder for a valuable consideration.

The second question is also, to a great extent, disposed of by the facts. The lease from the plaintiffs to Townsend was unknown and unrecorded. It was not known that Townsend ever took possession from the plaintiffs. The title was in his wife, and they were married before the act of 1848; and the lot was unincumbered. It is true that possession of a third person puts a purchaser upon inquiry, and makes it his duty to pursue his inquiries with diligence; but it is not absolutely conclusive upon him. (*Williamson v. Brown*, 15 N. Y., 361.) The rule laid down in that case is, that, when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. This presumption may, however, be repelled by proof. Under the facts and circumstances of this case, the possession of the premises by Townsend was not sufficient to put the bank upon inquiry as

Fassett v. Smith.

to the existence of any right inconsistent with that which it proposed to acquire. Townsend's possession was consistent with the record title. He was not a third person to the transaction, but joined in the deed with the owner of the fee. In the absence of proof of actual notice, nothing appeared calculated to excite suspicion, or which should have put the bank upon inquiry. But had inquiry been made, and the facts ascertained, it would not have shown Townsend in possession under the plaintiffs. The plaintiffs never had the title or the possession of the mill lot. Townsend never had the title to give them. It is true, when Townsend gave them a deed of another piece of land, he took from them a lease of the mill lot; but he did not enter into possession of the mill lot by virtue of that lease. He continued in possession under the right obtained from his wife. The lease gave him no right: the plaintiffs could give him no right, for they had none to give; and although the lease may have been good, as a contract, between the parties to it, the plaintiffs obtained no rights to possession by reason of it, as no possession had passed with it.

The question, therefore, comes down to this: Was the fact that Townsend had taken a lease for the mill lot, which was unknown to the bank, and under which no possession had been or could be received, taken or claimed, sufficient to put the officers of the bank upon inquiry as to the nature of Townsend's possession? I think it was not.

But if it were otherwise, there is another point which entirely disposes of this case. The plaintiffs were guilty of gross *laches*. The fraud complained of was discovered eighteen months before the mortgage was taken by the bank, and the matter was suffered to rest for fifteen months after that mortgage was given, until, upon the faith of it, in part, Townsend was enabled to increase his indebtedness to the bank from \$145,000 to \$281,000. As was said in *Waldron v. Sloper* (19 L. & E., 115), "it is an elementary principle that a party coming into equity is bound to show that he has not been guilty of such a degree of negligence as to enable another party so to deal with

Farnett v. Smith.

that which was the plaintiff's as to induce an innocent party to assume that he was dealing with his own." Had ordinary diligence been used in this case, Townsend would not have been able to palm off a mortgage upon these premises to another, and the plaintiffs would have been secured in their rights. As it is, one of two innocent parties must suffer; and as the plaintiffs, by their great neglect, put it in the power of Townsend to commit the fraud, they cannot ask the court to interfere. In any view of the case, the judgment must be affirmed.

COMSTOCK, Ch. J., SELDEN, LOTT, and HOYT, Js., concurred.

DENIO, J. (Dissenting.) The fraud of Townsend, by which he was enabled to procure from the plaintiffs the acknowledgment of satisfaction of the mortgage on the mill lot, is positively found by the judge. The right of the plaintiffs to the relief asked for, and which was afforded them at the special term, was therefore undeniable, unless the bank, of which the defendant Smith is the receiver, as the subsequent mortgagee of Townsend, stands in a better position than its mortgagor occupied. The plaintiffs' mortgage being satisfied at law, the bank became the mortgagee of the legal title in the land. The right of the plaintiffs to set aside the satisfaction and reestablish the mortgage was an equity merely, and could not be asserted against a *bona fide* purchaser or mortgagee. The question in the case is, whether the bank can claim the character of a *bona fide* mortgagee. Its pretension to be so considered is denied, on the allegation that the corporation, or its officers, had notice of the plaintiffs' equity, by means of the possession by Townsend of the premises, at the time the mortgage to the bank was executed, under the lease from the plaintiffs. The legal title was in the wife of Townsend, and she was one of the mortgagees. Her husband was in the possession of the premises. As there is no evidence that they lived separately, his possession is to be taken as her possession. They were married before the late statutes had weakened the bonds of marriage by creating separate and hostile interests between married persons.

Farnett v. Smith.

Before that change the husband had, during the joint lives of himself and his wife, a life estate in the wife's lands; and if they had a child, he became a tenant by the curtesy. But, independently of this common-law right, which perhaps did not apply to this property, if it was purchased subsequently to their marriage, as it may have been, I am of opinion that the husband's possession of the real estate of his wife is not to be considered hostile to the legal title, but, in the absence of any peculiar circumstance, is to be considered her possession. When, therefore, they mortgaged to the bank, the possession of Townsend was in no way inconsistent with the deed, and the bank was not under the necessity of making any inquiry. It is only where a person other than the grantor or mortgagor is in possession that it is necessary, in order to confer upon the purchaser or mortgagee a *bona fide* character so as to avoid any equity residing in the party so in possession, that he should make due inquiries of him as to his title. In general, the purchaser takes subject to the right of the party in possession. The rule, I conceive, has no application to the present case. Although Townsend had a lease from the plaintiffs, the bank had no notice of that fact. He continued in possession in the same manner ostensibly as before he took the lease, and that instrument constituted no part of the chain of title under which Mrs. Townsend, the real owner, held the land.

But it was not enough that the bank had no notice of the plaintiffs' rights. It was also necessary that it should have advanced money, or other valuable thing, to obtain the mortgage, or in consequence of it. If it was executed simply to secure an existing debt, nothing being advanced and no obligation or security given up, the plaintiffs are not precluded from setting up their equity against the bank as mortgagees of Townsend and his wife. (*In the Matter of Howe*, 1 Paige, 125; *Arnold v. Patrick*, 6 id., §10.) Upon this point, I think the defendant's case is defective. When the mortgage was given, Townsend was under liabilities to the bank to the amount of \$145,000, which was many times the value of the property. But it was a continuing security for future advances

Fassett v. Smith.

and indebtedness, so that if this debt had been paid off in whole or in part, so as to reduce the amount remaining unpaid below the limit mentioned in the mortgage, and additional loans had been made without notice of the plaintiffs' equity, the bank would have been a *bona fide* mortgagee in respect of such loans. If there had been no limitation of the amount for which the mortgage was to stand as a security, all the subsequent advances might have conferred upon it the character of a *bona fide* transfer, notwithstanding the inadequacy of the property to secure the old and the new portions of the debt. But it was an express provision in the instrument that it was to be a security for an amount not exceeding \$98,600. As the debt for which immediately upon its execution it became a security was much more than that amount, no subsequent advance could have any relation to the mortgage, unless the existing indebtedness should be reduced below the limit named. If payments had been made on account of that debt, so that so much as \$98,600 did not remain due, then every future advance up to that amount would be a loan upon the mortgage security. When that amount of indebtedness was again reached, subsequent advances would not connect themselves with the mortgage until future payments should again reduce the debt below the amount mentioned in the mortgage.

The findings of fact at the end of the case do not show that anything was paid after the execution of the mortgage to the bank. The contrary is inferable; for, it is stated that the liabilities of Townsend and of the Buffalo Car Company, at the time the mortgage was given, exceeded \$145,000, and that the amount was increased by subsequent loans, up to August 27, 1857, to over \$281,000. No inference can be drawn from this that anything had been paid during the interval; but, as Townsend continued to transact business with the bank, it is very probable the account fluctuated. The evidence of Mr. Davis, who seems to have managed Mr. Townsend's business and that of the Car Company at the bank, is, that the debt was not diminished at any time after the giving of the mortgage. It may possibly consist with this statement that the

Fassett v. Smith.

whole of the indebtedness constituting the \$145,000 may have been paid, and yet that the aggregate indebtedness of Townsend and the Company was not diminished; that is, they may have paid up the whole of the old debt while they were contracting a fresh one. As the security was a continuing one, the mortgage would attach, as has been mentioned, to the new loans as soon as the old debt was so far diminished as to leave a place, in the maximum amount for which the mortgage was a security, to be filled up.

It is not improbable that the bank may have consented to make fresh advances because it considered so large an amount of the old debt secured by the mortgage; but this would not make it a *bona fide* mortgagee in respect to such new loans. To have that effect, the loans must have been made on account of the mortgage security, in such a sense as that they might be collected by a foreclosure and sale of the mortgaged premises, if the proceeds were sufficient. If the question were between the mortgagee and subsequent incumbrancers of the mortgaged premises, the former could not retain more than \$93,600 out of the proceeds of the sale, and any residue would belong to the lien holders next in the order of time. If that sum remained due on the debt which existed when the mortgage was given, it is then clear that no advances have been made on account of the mortgage security; and there is nothing to show that so much has not at all times remained unpaid of that debt.

I am, therefore, of opinion that the receiver must be considered as succeeding to the case of the mortgagors, and that his title is subject to the plaintiffs' equity. If this were agreed to, the judgment of the general term would have to be reversed, and that of the special term affirmed; but it appears that different views are entertained by a majority of the judges.

DAVIES and MASON, Js., concurred in this opinion.

Order affirmed, and judgment absolute for the defendants.

Nichols v. Michael.

NICHOLS et al. v. MICHAEL et al.

The fraudulent vendee of goods and his assignee thereof for the benefit of creditors, are liable to a joint action by the vendor to recover possession. Where the vendee, gave his negotiable promissory note for the goods, the vendor is not bound to tender such note at the time of rescinding the contract; it is sufficient for him to produce it upon the trial, and deliver it to the custody of the court.

It is not necessary that the fraudulent representation, to avoid the sale, should be such as would sustain an indictment for false pretenses.

The doctrine of this case, as reported (18 N. Y., 295), explained and reiterated.

APPEAL from the Supreme Court. Action to recover the possession of certain goods, upon the allegation of property in the plaintiffs, and a joint detention by the defendants.

In April, 1853, the defendant Pinner purchased of the plaintiffs, the goods described in the complaint (the purchase amounting to \$6,500), on a credit of four and six months, for which he gave his two negotiable promissory notes. Pinner continued in business until the August following when he failed, and made an assignment to the defendant Michael, for the benefit of his creditors, giving preferences. This action was brought to recover the possession of those goods, alleging they were fraudulently obtained. The judgment from which this appeal was brought, was obtained on a second trial. On the first trial the notes given by Pinner at the time of purchase were brought into court and delivered to, and left with the clerk thereof to be canceled. On this trial, the notes could not be found.

When the plaintiffs rested, the counsel for each defendant moved for a nonsuit, separately, on the grounds: 1st. That no cause of action had been made out against either defendant, because it did not appear that Pinner had made any representations when he purchased the goods in 1853. 2d. It did not appear that the plaintiffs had been misled by any misrepresentations which Pinner had made. 3d. They had trusted to

23	264
129	466
23	264
127	316
127	562
23	264
132	55
23	264
143	594
23	264
a165	447
165	448

Nichols v. Michael.

Pinner's former character for business and responsibility. 4th. That if Pinner had concealed, or not revealed, his insolvent circumstances, he had a right to do so, although knowing of them. That as to either defendant there was nothing to submit to the jury. 5th. That the declarations of Pinner, either before or after the assignment, were not binding upon Michael. 6th. That if the purchases by Pinner in April, 1853, were fraudulent, the plaintiffs having taken his notes therefor, should have tendered the notes back before suit brought. 7th. It appearing at the time this action was commenced, that Pinner had delivered over the goods to Michael, he cannot be responsible in this action. The motion for a nonsuit was denied, and the defendants excepted.

The defendants then gave evidence on the issues; after which the cause was submitted. In his charge to the jury, the judge said: "If Pinner was insolvent, and concealed the fact of his insolvency with the design of procuring the goods and not paying for them, it was a fraud which rendered the sale void, if the plaintiffs so chose to regard it." "The point of inquiry in such case is, whether there was a preconceived design not to pay for the goods; that inquiry the jury must solve, taking into consideration the concealment and all the attendant and subsequent circumstances admitted in evidence, which may serve to throw light upon it." "If the jury find no other fraud in the case than the omission of Pinner to disclose his insolvency, it will not be sufficient to avoid the sale." "False representations in the case may be sufficient to avoid the sale, without being such as would be indictable under the statute against false pretenses." "A concealment on the part of the purchaser of his state of insolvency, known to himself at the time, accompanied by a preconceived design not to pay for the goods purchased, is such a fraud as would avoid the contract of sale." To all of which several parts of the charge, the defendants severally, and to each, duly excepted.

The defendants then, severally, requested the court to charge the jury, that the non-disclosure of insolvency requisite to avoid the sale for fraud, must be of some marked and sudden

Nichols v. Michael.

change in the affairs of the vendee, which he had reason to suppose unknown to the vendor. The court refused so to charge, and the defendants duly excepted.

The jury found a verdict for the plaintiffs for the possession of the property, and assessed the value thereof and damages for their detention—the property having been delivered to the defendant Michael. Judgment was entered for the plaintiffs, which was affirmed on appeal at general term in the eighth district.

John L. Talcott, for the appellants.

John Ganson, for the respondents.

JAMES, J. Whenever property is obtained from another upon credit, with the preconceived design on the part of the purchaser to cheat and defraud the vendor out of the same, the vendor, upon the discovery of the fraud, may avoid the contract and retake the property, unless it has passed to the possession of a *bona fide* holder for value. Such, I understand, was the conclusion of the court when this case was formerly before it. (18 N. Y., 295; *Hall v. Naylor*, 18 N. Y., 588.)

When the plaintiffs rested their case, they had given evidence showing that Pinner was insolvent when he purchased the goods in question; that before and at the time of his purchases, he represented that his business had been successful, that he intended to enlarge it and carry it more into wholesale, and keep it in such a position that he could come to New York in the fall to do business there; that he had an actual cash capital of over \$30,000; that his purchases at the time in the city of New York were over \$40,000; and having failed within four months thereafter, his assets were only \$29,000, and he owed, exclusive of what was due his New York creditors, about \$24,000. The evidence on this trial was the same as on the former trial, with the addition of that of Townsend, which proved the representations of Pinner at the time of the purchase. This was very material, and made a case proper for the jury.

Nichols v. Michael.

It is true, as a general rule, that a party who would disaffirm a contract must return, or offer to return, whatever he has received upon it. But in cases of fraud, when nothing is parted with by the fraudulent vendor but his own promissory notes, such a return or offer to return is not necessary before action brought; it is enough, if the notes are produced on the trial ready to be canceled. In a sale procured by fraud, no title passes; the vendor still retains his legal right to the goods, and rescinding the contract of sale, rescinds the contract of payment, and hence the notes fall with the contract. A note negotiable, whilst it remains in the hand of the vendor of the goods, stands upon the same footing in respect to a tender prior to the commencement of an action, as one not negotiable. (*Thurston v. Blanchard*, 22 Pick., 18; *Nellis v. Bradley*, 1 Sandf., 560; *Ladd v. Moore*, 3 id., 589.) Most of the cases, where a return has been held necessary before action, related to executory sales, and where the party sought to rescind because of the other party's failure to fulfill. In such cases, a tender is, no doubt, a condition precedent to a right of action. In this case, the note remained unnegotiated in the hands of the vendor, and therefore his right of action against Pinner was perfect without a tender.

As to Michael, a tender of the note and demand of the goods were made before action brought. As he was the general assignee of Pinner, to collect and receive all his dues and manage his assets, no good reason can be assigned why, if a tender to him were necessary, this was not sufficient for both. A surrender to Michael in that character would as effectually extinguish the notes as a delivery to Pinner.

Michael having the goods in possession was not only a proper but a necessary party defendant. But it was insisted that Pinner was improperly made a party, and that under the Code the action for the recovery of the possession of personal property can only be maintained against one who had in fact or in law the possession, control or title at the time of its commencement.

Nichols v. Michael.

Formerly, the action of detinue was the proper action where there was a wrongful detainer (2 Saund., 84). There are some *dicta* in the books, that this action would not lie unless the defendant was in possession (Bul. N. P., 51; 1 Selw. N. P., 546): but that was not so. The defendant was liable in the action, though he had delivered possession to another before action brought. (Comyn's Dig., A.; *Jones v. Doule*, 9 M. & W., 19; *Garth v. Howard*, 5 C. & P., 846.) In *Jones v. Doule*, PARKE, B., stated the rule to be "that detinue does not lie" against one who never had possession of the chattel, but does against him who once had, but has improperly parted with it. And Chitty says, "if he wrongfully delivered the goods to another he is liable; and I think the true rule was, that detinue would lie wherever the defendant had been in possession, whether he retained it or had wrongfully parted with it." In this State the action of detinue was abolished by the Revised Statutes, and that of replevin extended so as to serve all the purposes of both actions, and under that statute the action of replevin would lie, although the defendant had parted with the property. (2 R. S., 522, §§ 11, 19; 22 Wend., 602.)

The 2d chapter of title 7, part 2 of the Code, sections 206, 207, &c., entitled "claim and delivery of personal property," is a substitute for the action of replevin as given by the Revised Statutes, and such an action may now be brought in all the cases where replevin would formerly lie. Some conflict has existed in the courts on the question, whether an action under the Code could be maintained, to recover the possession of personal property when the defendant had not the possession either in law or fact at its commencement. It was held in *Roberts v. Randal* (8 Sandf., 707), by the Superior Court at general term that it could not. That was an action to recover a Texas bond; the question arose on an appeal from an order at chambers, discharging the defendant from arrest. The affidavits showed that the bond was delivered to the defendant to sell for not less than 40 per cent on the principal and interest, which the defendant some months prior to the suit had sold for 40 per cent on the principal only. The plaintiff had demanded

Nichols v. Michael.

the bond, or the amount of it at the price limited, which was refused. The court say, "by the plaintiff's own showing, the defendant had parted with the property long before the suit was commenced; and whatever it may be called, the suit is really one to recover damages for the conversion of the property." The order was affirmed. That case was followed at special term in *Brockway v. Burnap* (8 How., 188; 12 Barb., 347), and in *Elwood v. Smith* (9 How., 528); but the case of *Brockway v. Burnap* was reversed at general term (16 Barb., 309), and the court then held, that an action to recover personal property could be maintained, notwithstanding the defendant had wrongfully parted with its possession before the suit was commenced. This we think the better rule, and we concur in the view therein expressed, that "the legislature did not intend by the Code to abridge the former action of replevin as they found it; and that nothing therein prevents the present remedy, by an action to recover personal property, being as full, general and complete as that action was under the Revised Statutes." In this view of the case, an action properly laid against Pinner, notwithstanding he had assigned and delivered the property to Michael. He had fraudulently obtained the property and had it in his possession, and wrongfully parted with it. Michael was not a *bona fide* purchaser; the property was in his custody as trustee, for the benefit of Pinner's creditors, Pinner having an interest in the residuum after paying his debts. Here was such a connection as would sustain a joint action against the defendants. Pinner had fraudulently obtained the goods and wrongfully transferred them to Michael to dispose of them as his trustee; Michael had the possession and refused to surrender it on demand. The Code provides that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein. (§ 118.) Both these defendants claim an interest in the goods adverse to the plaintiffs; Pinner claiming that the purchase of the goods was free from fraud, and that they should be retained by his assignee, and

Nichols v. Michael.

disposed of for the benefit of creditors—Michael claiming the possession for the same purpose, and refusing to surrender on demand. They were properly joined as defendants.

The charge of the judge as to the degree of false representations was in accordance with the rule announced by this court in its former disposition of the case. The judge was also right in his refusal to charge as requested. That rule has no application where (as in this case) there was evidence of false representations at the time of making the purchases. It has application only when there is no proof of affirmative acts or representations, but rests wholly on the non-disclosure of insolvency.

That part of the charge which stated "that sufficient false representations in this case to avoid the sale, need not be such a false representation as would be indictable under the statute against false pretenses," was also correct. If goods are obtained by fraud, the vendor may rescind the sale and follow his goods, whether such fraud be indictable or not. The right to rescind does not depend upon the provisions of the law for punishing the offender criminally. If there be fraud in the purchase, the sale is voidable at the option of the vendee. (*Cary v. Hotelling*, 1 Hill, 811, 817.)

I have been unable to discover any error which calls for a reversal of this case, and the judgment should therefore be affirmed, with costs.

SELDEN, J. There was no doubt sufficient evidence to justify the submission of this cause to the jury, upon the question of fraudulent misrepresentation and concealment on the part of Pinner, when he purchased the goods: and as the defendant Michael advanced nothing upon the faith of Pinner's title, he is in no better situation than Pinner himself. If the case was made out as to Pinner, the title of Michael under the assignment must of course fail, and he had no right to refuse to deliver the goods upon demand.

It is insisted that an action to recover possession will not lie against Pinner, because he was not in possession at the time

Nichols v. Michael.

of the commencement of the suit; and because his previous possession was rightful, no attempt having been made by the plaintiffs to rescind until after the assignment and delivery to Michael; and that at all events there can be no recovery against Pinner and Michael, jointly. These objections are, I think, sufficiently answered by the cases of *Garth v. Howard et al.* (5 Car. & Pa., 346), and *Jones v. Dowle* (9 Mees. & Wels., 19). In the first of these cases, the defendant Howard, being lawfully in possession of certain plate belonging to the plaintiff, had, without authority from the plaintiff, pledged it, with the other defendant Fletcher for £200. The plaintiff demanded the plate of the latter, and then brought detinue against both. It was objected there, as it is here, that Howard had no possession at the time of the commencement of the suit, and hence the action would not lie against him. The court held, that the action would lie against both. TINDAL, Ch. J., said: "The verdict must pass against both defendants, as one could not stand in a better situation than the other." The decision in this case was put partly upon the ground that the defendant Howard had not assumed to part with the whole interest in the property, but retained some control over it by virtue of the right of redemption. But the Chief Justice also says: "The question is, whether Howard has wrongfully pledged. If he has done so, he is answerable." The other case, viz.: *Jones v. Dowle*, fully sustains the latter ground. There the plaintiff had bought a picture at an auction, at which the defendant acted as auctioneer. The latter, by mistake, entered the name of one Clift as the purchaser, and delivered the picture to him. The plaintiff demanded the picture of Clift, who refused to deliver it, and then brought detinue against the auctioneer. The counsel for the defendant insisted that the plaintiff was bound to show that the picture was in the possession or custody of the defendant, or of an agent over whom he could exercise control, at the time of bringing the action. But the court overruled the objection. PARKE, B., said: "Detinue does not lie against him who *never had* possession of the chattel; but it does against him who once had, but has improperly parted with the possession of it."

Nichols v. Michael.

The theory upon which these cases proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both; because the acts of both unite in producing the detention.

It does not affect the principle, that Pinner in this case came to the possession of the goods by delivery, and under the former purchase, and not as a trespasser. If they were fraudulently obtained, he had no right to retain possession for one moment as against the plaintiffs, and could transfer no such right to his assignee. The action proceeds, not upon the ground of a tortious taking, but of a wrongful detention; and to this, Pinner has contributed by placing the goods in the possession of the defendant Michael, who refused to deliver them. The case cannot be distinguished in principle from the two English cases, to which I have referred.

But it is further insisted, that the plaintiffs should have been nonsuited; because they did not restore or offer to restore the notes of Pinner before commencing the suit. There is no doubt of the general rule, that where one party to a contract elects to rescind it for fraud, it is an indispensable preliminary that he surrender all that he has received from the other party upon the contract; and, if he has disabled himself from doing this, it is too late to rescind. It has been held in several cases, that this principle applies when the party seeking to rescind has received the promissory note of a third person, as the consideration of the contract on his part. He must, in such cases, restore or offer to restore the note before bringing the suit. (*Masson v. Bovet*, 1 Denio, 69; *Baker v. Rollins*, 2 Denio, 137.) In the present case, the notes received by the plaintiffs were the notes, not of third persons, but of Pinner himself; and there is this important distinction to be observed, viz.: that in the

cases cited, the notes were not affected by the election of the party to rescind the contract, but might still be enforced notwithstanding the rescission, while, in this case, the moment the contract was rescinded, the notes, if in the hands of the plaintiffs, became entirely invalid and worthless. I am not aware that it has been held, that in such a case the restoration of the note is a condition precedent to the right of the party to rescind. It is intimated by BEARDSLEY, J., in the case of *Baker v. Robbins* (*supra*), that if the notes in that case had been shown to be of no value, it might not have been necessary to return them. The notes of Pinner in this case, were of course rendered utterly valueless by the rescission of the contract. The rule has not, I think, been carried to the extent of holding that in such a case, the notes must be returned before a suit is brought. It would certainly be more in consonance with equity, to hold it sufficient to produce the notes upon the trial, and surrender them to the custody of the court, as in that case the rights of both parties are protected. If the fraud is made out and the contract subverted, the notes are void and will be canceled by the court. On the other hand, if the plaintiff fail to establish the fraud, the notes can be restored to him if the nature of the contract is such that justice requires it. Such a rule is not, I think, in conflict either with authority or principle, and may, therefore, be safely adopted. The negotiability of the notes in this case is of no importance, so long as they have not been negotiated: nor do I think it would affect the rule if they had been at some period out of the hands of the plaintiffs, provided the possession and exclusive interest was in them at the time of the trial. The motion for a nonsuit, therefore, was properly denied.

The remaining questions arise upon the charge of the judge. He instructed the jury, that if the defendant Pinner was insolvent and concealed the fact of his insolvency, with the design of procuring the goods and not paying for them, it was a fraud, which would avoid the sale at the option of the plaintiffs. It seems to have been supposed by the counsel in this case, if not by the court below, that this instruction is in conflict with

Nichols v. Michael.

something said by myself, when this cause was here upon a former occasion. (18 N. Y., 295.) My language must have been very inexplicit, if what I then said will bear the interpretation which appears to have been given to it; as I am not conscious of having ever held an opinion on this subject differing in the slightest degree from that expressed by the judge before whom this cause was tried.

The principles I intended to assert were: 1. That a mere intention of a vendee not to pay for the goods he purchases, unaccompanied by any misrepresentation or concealment, is not such a fraud as will vitiate the sale; and 2. That the bare omission of a purchaser to disclose his insolvency at the time of the purchase, not accompanied by any intent to defraud, is in like manner insufficient to destroy the contract. But I did not say that when the two are combined, that is, when the concealment of the fact of insolvency is accompanied by an actual intent to cheat, there is no fraud. That question was not presented by the case. The difficulty with the case at that time was, that the judge had not in his charge connected the two circumstances together, viz., the intent and the insolvency, but, on the contrary, by his refusal to charge as requested, authorized the jury to infer, that if they should find that Pinner was insolvent and omitted to disclose the fact, although without any fraudulent intent, their verdict should be for the plaintiff. This was a manifest error, and for that the judgment was reversed.

The judge, upon one construction of a portion of his charge, appeared to have instructed the jury, that although Pinner was not insolvent, and was guilty of no misrepresentation or concealment of any preëxisting fact, yet if, when he made the purchase he intended to avoid paying for the goods, this would be such a fraud as would vitiate the sale. What was said in regard to the effect of a naked intent not to pay for goods purchased was designed to meet this view of the charge. There can, I apprehend, be no doubt of the correctness of the doctrine then advanced upon this subject.

Butterworth v. O'Brien.

The jury were further instructed, that, in order to avoid a sale for fraud, the false representation need not be such as would be indictable under the statute against false pretenses; and to this the counsel excepted. This exception is clearly untenable. The only case which appears to afford any countenance to the doctrine contended for, is that of *Cross v. Peters*, (1 Greenl., 378.) Such a position was not necessary to the decision of that case, and the reasoning in its support is, I think, unsatisfactory. The judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

BUTTERWORTH, Receiver, &c., v. O'BRIEN.

The statute (ch. 172 of 1850), to prohibit corporations from interposing the defence of usury, deprives them of the right to recover back money paid by them in excess of legal interest.

APPEAL from the Supreme Court. The complaint set forth the appointment of the plaintiff as Receiver of the Island City Bank, an insolvent corporation, and averred that the bank, within a year preceding the commencement of the action, had paid, and the defendant had received, on the loan or forbearance of sundry sums of money upon a corrupt or usurious agreement, the sum of at least \$10,000; for the repayment of which he prayed judgment. The defendant demurred, upon the ground that the complaint did not state a cause of action. The defendant had judgment on the demurrer, which having been affirmed at general term in the first district, the defendant appealed to this court.

Charles H. Peabody, for the appellant.

Waldo Hutchins, for the respondent.

Butterworth v. O'Brien.

DAVIES, J. This action is founded upon the provision of the Revised Statutes, which authorizes any person, or his personal representatives, who shall, on any loan or forbearance of money, have paid or delivered any greater sum than is allowed by law, to recover from the person to whom the same was paid, or by whom the same was received, the amount so paid, provided the action is brought within one year after such payment. (1 R. S., 772, § 3.) Assuming that the bank is a person within the meaning of this act, and that the plaintiff is his personal representative, we are to inquire whether the action can be maintained. The plaintiff represents the bank, and stands in its position. If the bank could maintain the action, he can; and it follows, that, if the bank could not maintain it, he cannot. He represents no greater right or higher equities in this matter than those possessed by the bank. Previous to the act of 1850, corporations, in reference to the provisions of the statute of usury, stood in the same position as individuals. They could, and did, avail themselves of the provision of the statute, to be released from their contracts affected with the taint of usury. The celebrated case of *The Dry Dock Bank v. The American Life and Trust Company* (3 Comst., 344), is an instance of a corporation availing itself of the statutes to prohibit usury, for the purpose of relieving itself from its contracts. It had committed usury, and had derived a benefit therefrom, and then came into a court of equity to punish its *confre* in guilt by repossessing itself of the property parted with, whilst retaining for its own benefit what it had received from the opposite party. This court, in obedience to the positive mandate of the statute, had to lend its aid to the perpetration of such gross injustice. It is not surprising that an act which produced such results should have been stigmatized, by one of the learned and eminent judges of this court, as "severely penal in its provisions;" that, "in fact, it was a barbarous act, unworthy of the age and country where it was found." (*Per BROWN, J.: Curtis v. Leavitt*, 15 N. Y., 151.) The case of *The Dry Dock Bank* was decided in December, 1849, and at the ensuing session of the legislature the act of April 6, 1850,

Butterworth v. O'Brien.

was passed. It is well known that it was called for by that case, and it was intended to prevent a repetition of a similar transaction. It is entitled "an act to prohibit corporations from interposing the defence of usury;" and the first section declares that "no corporation shall hereafter interpose the defence of usury in any action." The learned judge, whose opinion in the case of *Curtis v. Leavitt* I have already referred to, proceeds to show that the provisions of the statute in reference to usury in favor of the borrower are in the nature of penalties, imposed on the lender, for the infraction of the statute; as they unquestionably are. And he cites authorities to sustain the position that the effect of a repealing clause upon a previous statute, which imposes a penalty, takes away all right to the penalty. The judge proceeds to say: "The effect of the act of the 6th April, 1850, is to repeal the statute of usury, so far as it applies to corporations. The condition of this class of beings becomes the same as if the usury laws never existed. The title of the repealing act is significant. It is, 'to prohibit corporations from interposing the defence of usury in any action.' The first section then declares, in a few short, emphatic words, that the defence of usury shall not thereafter be interposed. It is the defence which is prohibited. The barrier wall, the place of strength, which the usury laws set up between the lender and the borrower, is thrown down and leveled with the ground, whenever the borrower is a corporation. Henceforth, the law offers no rewards of bad faith and broken promises to this class of contractors. * * * The object of the act is to take away from corporate bodies the defence of usury—a defence which most men have come to regard as immoral, mischievous and unjust. It should have a liberal interpretation." COMSTOCK, J., at page 85, says: "I am inclined to think that the statute would be decisive against the right of the receiver to allege usury in any stage of these causes, either as a defence to the original bill or as a foundation for his cross bill. My impression is that the act must be construed as a repeal of the statute of usury as to all contracts of corporations stipulating to pay interest, thus leaving the contracts in full force according

Butterworth v. O'Brien.

to their terms." SHANKLAND, J., at page 174, says: "To interpose the defence means not only to plead it, and give evidence thereof, but also to use it at the trial as a defence. The inhibition extends to the entire series of acts which constitute the defence, and to each of them." PAIGE, J., at page 228, says: "The prohibition is, that no corporation shall, after the passage of the act, interpose the defence of usury in any action. This prohibition is not directed merely against pleading or proving the defence, but it is against interposing it, that is, either by plea or by proof, or by claiming the benefit of it at the trial or hearing. The statute was intended to embrace in the prohibition the setting up as a defence usurious agreements." At page 229 he says: "As soon as the statute imposing the penalty is repealed, the very foundation of the action to recover it is taken away, and the action must fall with the law. The act of 1850 is, in substance, a repeal of the statute of usury, so far as relates to corporations. * * * The prohibition applies not only to the corporation, but also to all who claim under or through it." SELDEN, J., at page 255, says the "intention obviously was to take away altogether from corporations the defence of usury. Proving usury upon the trial, setting it up at the hearing, is interposing it as a defence, no less than the pleading it." When we bear in mind the circumstances under which this act was passed, we cannot be at a loss for the meaning of the words used by the legislature. A corporation had set up, as a defence to a contract, or, in other words, the grounds upon which it was illegal, the privileges secured to them by the statute of usury. This had not been done, in the technical sense of a defence to an action, or setting up as a defence the statute of usury. But they had interposed the defence of usury to a claim against them, and on that ground had sought affirmative relief. It was the intent of the legislature to prohibit such an interposition, or taking advantage or benefit from the defence of usury. It is quite immaterial, when we look at the objects of the legislature, whether this claim by a corporation to avail itself of the statute be set up affirmatively or be interposed as a shield, when attacked by

Butterworth v. O'Brien.

the other party to the usurious contract. It was obviously the meaning and intent of the legislature to take away from corporations altogether all benefit or advantage resulting from the statute of usury. As to them, it was as though it never had existence as a law. It was not thereafter to be used or taken advantage of by them, either as a weapon of attack or as a shield for defence.

It is conceded by the learned counsel for the appellant that, if the defendants had prosecuted the bank for the moneys loaned it, they could have recovered the amount so loaned. The prohibition precluded the bank from setting up in defence, either by pleading or proof on the trial, that the loans were usurious. The defendants would then clearly have recovered. But, says the learned counsel, the statute gives to the bank the right to recover back the usurious interest paid, and it would follow, therefore, that the bank, in the suit against it to recover its loans, could have set up as a counterclaim the usurious interest paid, and claimed its deduction from the amount due the defendants. Is not this interposing the defence of usury to the plaintiff's demand? And it presents the anomaly of holding the same contract both legal and illegal, *in uno flatu*. It is legal to enable the lender to recover from the borrower, the corporation, the money loaned, and illegal to enable the defendant, the corporation, to recover from the plaintiff a penalty given by reason of such illegality. The same contract cannot thus be divided and held legal as to one party and illegal as to the other. It is either legal or illegal *in toto*; and as the statute makes it legal as to the lender, it cannot be made illegal to suit the purposes of the borrower. As was well said in the court below, "the money borrowed, the legal interest, and the usurious premium, are all mingled together in one transaction, form part of one single and indivisible contract; and when the statute says the defence of usury shall not be interposed to it, I think it means each and every part of it: no one part more than another."

The judgment of the Supreme Court should be affirmed, with costs.

Butterworth v. O'Brien.

JAMES, J. The rate of interest in this State is fixed by statute (1 R. S., 771, § 1,) at seven per cent. By section 2, all persons and corporations are forbidden, either directly or indirectly, to take or receive more than that rate; and section 3 declares that "every *person* who, for any loan or forbearance of money, shall pay or deliver any greater sum or value than is allowed by law, and his personal representatives, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above such rate, if such action be brought within one year after such payment or delivery."

This action is brought under that section of the statute, and the defendants insist that it cannot be maintained because corporations are not included within the language of that section, and are not authorized by it to bring an action like this; that a right of action to recover back usury actually paid is only given to natural persons.

It is important to note that while the second section, which prohibits the taking of usury, names both "*persons and corporations*" as within the prohibition, the third section only names "*persons*" as authorized to recover back any excess of interest paid. Using the term corporation in one section, and omitting it in the next, indicates that the omission was intentional on the part of the legislature, and that it did not intend to confer upon corporations the right given by that section to individuals.

The legislature has, in two instances in the statute, and in only two, seen fit to define the word "person," and to declare that, when used in the sections or chapters therein designated, it should be construed to mean "corporations," &c., viz., that which relates to "crimes and their punishments," and that which relates to "promissory notes and bills of exchange." The implication from this fact, in the absence of any general statute on the subject, is, that where the term "person" is used in other parts of the statute, its meaning is not to be extended beyond its common and ordinary signification.

Whitney v. Thomas.

That being so, the right to bring an action for the recovery of the excess paid upon a usurious transaction is not given to corporations, and this would accord with the more recent statute which prohibits a corporation from interposing the defence of usury.

It was enacted in 1850 that no corporation should thereafter interpose the defence of usury in any action. The plaintiff insists that this statute was intended only to deprive corporations of the right to avail themselves of a forfeiture of the contract given by the statute of usury as a defence, and not to interfere with any rights of action given by any other statute to recover back any excess of interest actually paid beyond the legal rate. Such, however, is not its fair construction. Its legitimate effect was to repeal the existing usury laws of this State as to corporations. (*Curtis v. Leavitt*, 15 N. Y., 9.)

It is certain, therefore, that this action could not be maintained by the corporation itself. The receiver stands in no better position. He is the representative of the corporation, having its title to the assets and subject to its disabilities in relation to all its affairs. He can assert no claim which it could not; and the corporation having no right of action for this matter, he had none.

All the judges concurred in the result, without committing themselves to the reasoning of either of the preceding opinions, or in any respect further than necessary to decide the case.

Judgment affirmed.

WHITNEY *et al.* v. THOMAS.

Under the Revised Statutes (vol. I, p. 391), the assessment of land to a person who was neither the owner nor occupant is void.

Where land was assessed to an inhabitant of the ward in which it was situate, and was returned for the non-payment of taxes, prior to 1850, the Comptroller's sale and deed thereof conveyed no title to the purchaser.

23	281
129	112
23	281
132	325

Whitney v. Thomas.

APPEAL from the Superior Court of the city of Buffalo. Action to recover the possession of land in a part of that city which was formerly the south village of Black Rock. The trial was in September, 1858, before the court, a jury having been waived. The plaintiff proved a patent from the State of the premises in controversy to Ogden Edwards: a conveyance to himself from the latter: that the premises were not occupied by any person from 1845 to 1856, when the defendant took possession: that Edwards and the plaintiff, during all that time, were residents of the city of New York; and that the premises had never been owned or claimed by any resident of the county of Erie (in which they were situated) until claimed by the defendant. The defendant made title under a deed from the State Comptroller, dated January 7, 1856, reciting a sale of the land in November, 1855, as returned for the non-payment of taxes. The facts in relation to the assessment of such taxes are sufficiently stated in the following opinion. There was a question upon the trial as to the validity of a redemption of the land from the Comptroller's sale. The plaintiff had judgment, which having been affirmed at general term, the defendant appealed to this court.

William H. Greene, for the appellant, argued that the situation of the land in their town gave jurisdiction to the assessors. If, in executing their duty, after "diligent inquiry in ascertaining the names of the taxable inhabitants," and after preparing the assessment roll "according to the best information in their power" in the particulars required by the statute, it turns out that they have made a mistake and assessed, as belonging to an inhabitant of the town, land which in fact belonged to a non-resident, such mistake does not invalidate the assessment, nor enable the plaintiff to impeach the Comptroller's deed. The assessment roll is a record, and evidence not to be impeached collaterally, that Merritt did occupy, or claim to own, the land, and that the assessors ascertained the fact. He cited *Van Rensselaer v. Witbeck* (7 Barb., 189), and claimed that the reversal of that case by this court (3 Seld., 517) was upon the

Whitney v. Thomas.

ground only that the certificate of the assessors was not in compliance with the statute, and did not impair the authority of the case below as to its effect had it been regular in form.

George R. Babcock, for the respondent.

SELDEN, J. It is unnecessary to pass upon the validity of the redemption set up by the plaintiffs in this case. There are other conclusive objections to the title of the defendant. Assuming that the act of 1855 (Sess. Laws of 1855, p. 798, § 65) applies to the conveyance executed by the Comptroller to Mr. Lansing in January, 1856, such conveyance is made by that act presumptive evidence merely of the regularity of the sale and previous proceedings. This evidence is liable to be rebutted by proof that the assessment of the tax, or any other portion of the proceedings prior to the conveyance, was irregular and not in conformity to the statutory provisions on the subject.

It appears by the certificate of the Comptroller, which was read in evidence without objection, that the sale, pursuant to which the deed of the Comptroller was executed, was made for taxes assessed in the years 1846, 1847, and 1848. The assessment rolls for those years were produced upon the trial, from which it appears that the premises in question were assessed in each year, not as non-resident lands, but to one William Merritt, as a taxable inhabitant of the town of Black Rock. By referring to the statutes on the subject of the assessment and collection of taxes, it will be seen that at the time these taxes were levied there was no authority for the sale by the Comptroller of lands assessed to inhabitants of the town or district where the assessment was made. The remedy at that time, in case of the failure to collect any tax thus assessed, was prescribed by the Revised Statutes (1 R. S., p. 403, § 27), which provided that, in case the taxes upon any land assessed to a resident should be returned as unpaid, the supervisor of the town in which the land was situated should add a description thereof to the assessment roll of the next year, and should charge the same with the uncollected tax of the preceding year.

Whitney v. Thomas.

The double tax was then to be collected in the same manner as if the whole had been assessed in the second year. This mode of accumulating the taxes returned afforded the only means of collecting the unpaid taxes upon the lands of residents, until the year 1850, when an important change was made.

Section 5 of the act in relation to the collection of taxes on lands of non-residents, passed April 10, 1850 (Sess. Laws, 1850), provides that in case of the return of any tax assessed to a resident owner as unpaid, the supervisor of the town or ward shall add a description of the lands to the assessment roll of the next year, "in the part thereof appropriated to taxes on lands of non-residents, and shall charge the same with the uncollected tax of the preceding year." It then directs that "the same proceedings shall be had thereon, in all respects, as if it was the land of a non-resident, and as if such tax had been laid in the year in which the description is so added."

This act was repealed by the act of April 13, 1855; but section 5 of the latter act (Sess. Laws of 1855, p. 782) substantially reenacts the provision. Both these statutes are purely prospective in their terms, and neither has any application to lands returned to the Comptroller prior to April 10, 1850. The precise period when the lands in question here were returned does not appear; but it is undoubtedly to be inferred that they were returned before that date. If not returned prior to that time, the amount of the tax must have been equal to the aggregate of all the taxes upon the premises from 1846 to 1850, as the statute then in force required the taxes to be accumulated from year to year, as we have already seen. But the sum for which the land was sold shows that this had not been done. Assuming, then, as I think we may, that the return of this land for the unpaid taxes of 1846, 1847, and 1848, was made prior to April, 1850, its sale by the Comptroller was wholly unauthorized by any law, and the deed executed pursuant thereto was consequently void.

But there is another reason why the sale in question, if otherwise regular, could not be sustained. The assessment was made in the name of a person having neither the owner-

Whitney v. Thomas.

ship nor possession of the land, nor, so far as appears, any interest in or connection with it. The mode of assessing lands is prescribed by the Revised Statutes (1° R. S., p. 389, §§ 1, 2 and 3). These sections provide as follows:

"§ 1. Every person shall be assessed in the town or ward where he resides when the assessment is made, for all lands then owned by him within such town or ward, and occupied by him, or wholly unoccupied.

"§ 2. Land owned by a person residing in the town or ward where the same is situated, but occupied by another person, may be assessed in the name of the owner or occupant.

"§ 3. Unoccupied lands, not owned by a person residing in the ward or town where the same are situated, shall be denominated 'lands of non-residents,' and shall be assessed as herein-after provided."

These sections require that, if the owner resides in the town or ward, the lands shall be assessed to him, unless they are actually occupied by another, and then they may be assessed either to the owner or occupant. If the owner does not reside in the town or ward, they must be assessed as non-resident lands. The provisions are imperative. There is no authority whatever for making the assessment otherwise than as they direct. The provision in section 2, that the lands may be assessed either to the owner or occupant, would be wholly nugatory if they could be legally assessed to one who is neither owner nor occupant. The supposition entertained by the counsel, that the assessors have jurisdiction in consequence of their obligation to assess all the lands in the town or ward, and that, if they make due inquiries, and assess according to the best information they can obtain, their action cannot be impeached in any collateral proceeding, is erroneous. A warrant, issuing from the proper source and regular upon its face, may protect the collector. But the assessors have no jurisdiction to assess except as the statute prescribes; and unless they pursue the directions of the statute, the assessment is unauthorized and void.

Carman v. Plass.

If lands belonging either to a resident or a non-resident could be assessed to a third person having no connection with the premises, and if such an assessment could be made the foundation of a sale and conveyance of the lands by the Comptroller, great inconvenience and injustice might result. The true owner would be misled. He would have no notice of the assessment or of the proceedings upon it, and it would require extraordinary vigilance to discover and trace out such proceedings. The law protects the owners of property from being placed in such a position, by requiring that, when they are to be divested of their title to such property by any statutory proceeding, the directions of the statute must be strictly pursued. (*Sharp v. Spier*, 4 Hill, 76; *Sharp v. Johnson*, id., 92.)

Upon each of the grounds here suggested, the sale and conveyance of the premises in question by the Comptroller was unauthorized and void; and as the plaintiffs proved upon the trial a valid title, which appears to be wholly unimpaired except by the Comptroller's sale, the judgment of the Superior Court of Buffalo should be affirmed.

All the judges concurring,

Judgment affirmed.

CARMAN v. PLASS et al.

A joint action lies under section 120 of the Code against a lessor and one who is a party to the lease, and therein guarantees the performance of the lessor's covenants.

APPEAL from the Supreme Court. The action was commenced in the City Court of Brooklyn, where the plaintiff complained against the defendant, Plass, as the lessee for years of certain premises, claiming to recover \$116.66, being arrears of rent due and payable March 1, 1859. The lease was aver-

Carman v. Plass.

red to be by indenture between the plaintiff, of the first part, the defendant Plass, of the second part, and the defendant Mix, of the third part, executed under the respective hands and seals of the parties, whereby Plass covenanted to pay the rent required; and it was alleged that the defendant Mix, by the same indenture, did, "in consideration of the premises, and of the sum of one dollar, guarantee unto the plaintiff the payment of the aforesaid rent and the faithful performance of the covenants in the said lease contained." The complaint further set forth that Plass had made default in the payment of rent, and that the plaintiff had notified Mix thereof, and that both defendants had failed to comply, &c. There was a general demand of judgment against both defendants.

The defendants demurred, on the ground that no cause of action against the defendants jointly was set forth in the complaint.

The City Court gave judgment in favor of the defendants; but it was reversed on appeal at a general term of the Supreme Court, and judgment was rendered in favor of the plaintiff. The defendants appealed to this court.

Henry R. Cummings, for the appellants.

Alexander Hadden, for the respondent.

DENIO, J. This case comes precisely within the language of section 120 of the Code of Procedure, which provides that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff." I see no reason to doubt that it is likewise within the meaning and intention of the enactment. It relates expressly to several, and not to joint liabilities. The latter did not require the aid of a special provision; for a plurality of joint contractors always could be, and generally were required to be, sued together; and provision was made in the act concerning joint debtors, for omitting to serve

Carman v. Plass.

process on all, if the creditor should so elect. But, though this were otherwise, the provision in question relates, in terms, to cases where a plurality of persons contract several obligations in the same instrument. That was the case here. It may be said that the cause of action is not, in this case, precisely the same against both the defendants. The lessee engaged to pay the rent unconditionally, and the surety was under no obligation until the principal had made default. But, after such default, each of them was liable for the same precise amount absolutely. They were, therefore, within the language which speaks of persons severally liable upon the same instrument. If this were otherwise doubtful, the reference to suits upon bills of exchange and promissory notes makes it entirely certain that the present case was one of those in the contemplation of the authors of the section. The parties to such paper are included in the provision. The indorsee of a bill or note, and the drawer of an accepted bill, are only liable contingently, and after being charged upon a default of the maker or acceptor. They were included in the scope of the enactment, because, though, in a general sense, parties to the paper on which their names are placed, they are not parties to the obligation, or instrument, in the same strict sense as the surety in the case under consideration. No doubt, a pretty radical innovation upon the common-law system of pleading was made when, by the act of 1832 (p. 489, § 1), the several obligations of parties to a bill or note were allowed to be enforced in a single action. But this had become familiar law when the Code was written, and it seems then to have been considered that the principle might be usefully extended to cases like the present; and the section referred to appears to me to have been framed for that purpose. I am not able to entertain any doubt respecting the correctness of the judgment of the Supreme Court. In the cases from 11 Howard's Practice Reports, 218, and from 10 Barbour, 638, to which we have been referred, the separate undertaking of the surety was contained in a different instrument, and it was held that he could not be joined as a defendant in an action against the principal. It

Scott v. The Ocean Bank in the City of New York.

was assumed by the court that, in a case like the present, where both parties were bound by the same instrument, the statute would apply.

I am in favor of affirming the judgment of the Supreme Court.

COMSTOCK, Ch. J., and MASON, J., dissented; all the other judges concurring,

Judgment affirmed.

SCOTT v. THE OCEAN BANK IN THE CITY OF NEW YORK.

23	289
114	34
23	289
117	394

The property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor.

Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing.

It is not enough to warrant such an inference that the customer was a large depositor of money and bills, and constantly drawing drafts against his remittances, under an arrangement by which he was allowed interest on his average balances; and that after the banker had transferred a bill remitted to him, after acceptance but before payment, failed and suspended business at the place where the remittance was received, the customer continued to draw upon him as before at an office in another State, where the banker did not suspend business.

These facts create the relation of debtor and creditor in respect to money received by the banker, but are insufficient to charge him with responsibility for a bill previous to payment, and consequently to vest him or his assignee for a precedent debt, with the property in such bill.

APPEAL from the Superior Court of the city of New York. Action by the plaintiff, as the assignee of one Lyell, to recover of the defendant the proceeds of a bill of exchange for \$2,000, remitted by Lyell to the Ohio Life Insurance and Trust Company at its office in New York, and by the latter transferred to the defendant, after acceptance, as security for a precedent

Scott v. The Ocean Bank in the City of New York.

they were, that they might be made for the bills remitted before collection, as well as the money. No reasons are disclosed in the case from which it can be reasonably inferred, that the company would consent or had any inducements to consent to treat as cash, and make itself debtor for, every bill that might be remitted to it without reference to the standing and responsibility of the parties, which in many cases might be unknown, especially when Lyell himself, as in the case of the bill in question, was not a party to such bill. It is more reasonable to assume that it would at least reserve the right to elect, whether to give credit absolutely or not before the proceeds were realized; and until such election was made, and credit was in fact given therefor, the bill would be held by it as the property of Lyell, and not its own. When, therefore, it appears that the bill in question was retained in the possession of the company after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection, or that Lyell ever drew or was entitled to draw upon the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be considered that the company at the time of the transfer stood in the relation of agents for its collection merely. There is no ground based on those dealings (and no other is claimed), for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell in relation to the bill in question existed, or that it had become as between them the property of the company. Lyell consequently continued to be the owner of it at the time of its transfer, and the defendants never acquired any right to it as against him or the plaintiff who had succeeded in his title. The facts found by the court below, show that they received it, with other securities, to secure a precedent indebtedness of the company to them, and that they neither advanced nor paid any new consideration on receipt of this bill, and they only gave credit for its proceeds after it was paid, in extinguishment of so

Nelson v. The People.

much of the defendants' account against the company. The defendants therefore were not *bona fide* holders thereof for value, and are not entitled to its proceeds as against the plaintiff. It follows, that the judgment of the Superior Court at special term was erroneous, and that the order for a new trial was properly granted, and the plaintiff under the stipulation is entitled to judgment absolute.

All the judges concurring,

Ordered accordingly.

NELSON v. THE PEOPLE.

The legislature may constitutionally designate, or provide for the designation of, Justices of the Peace to sit in the Courts of Sessions by any law general or special.

Accordingly *held*, that a Court of General Sessions was properly constituted where the justices were designated by name in a special act of 1860, and were deficient as to one of the qualifications required by the general law (ch. 470 of 1847, § 34).

Justices of the sessions are not required to take any official oath other than that which they take as justices of the peace.

WRIT of error to the Supreme Court. The plaintiff in error was indicted at the Otsego General Sessions. The indictment contained eight counts. The eighth count charged that the prisoner, with intent feloniously to do bodily harm to one Allanson, made an assault on him with a certain sharp, dangerous weapon to the jurors unknown, and other outrages then and there did, &c. The prisoner was found guilty on this count. On error, the Supreme Court affirmed the conviction.

When the trial was moved in the Court of Sessions, and before the jury was impaneled, the prisoner by his counsel moved to quash the indictment, because that court, as organized, had no authority or jurisdiction to try the indictment.

Nelson v. The People.

This motion was made upon the following admitted facts: The trial was moved August, 1860, before Levi C. Turner County Judge, and Harvey W. Brown and John W. Richardson, Justices. Brown had been elected a Justice of the Peace in the spring of 1859, for four years from the first of January, 1860; and he was appointed in November, 1859, to fill a vacancy in that office. Richardson had been elected a Justice of the Peace in 1855, for four years from the first of January, 1856, and again in March, 1859, for four years from January 1st, 1860; and in November, 1859, both Brown and Richardson were designated by the electors of Otsego as Justices of the Sessions for the year 1860, and both took the oath of office as such Justices of the Sessions before the 1st day of January, 1860.

The District Attorney produced and read in evidence an act of the legislature of this State passed February 4th, 1860, entitled an act relative to the Justices of the Peace of Otsego county, designated and elected to hold Courts of Sessions in said county at the general election in 1859. It designated Brown and Richardson as the two Justices of the Peace to hold Courts of Sessions for 1860, authorizing and empowering them to act as such with the same force and effect as if each had two years to serve as Justices of the Peace, when designated by the electors as Justices of the Sessions in November, 1859; and that they might take the oath prescribed by the Constitution at any time before the first day of March, 1860. The motion to quash the indictment was denied; and the prisoner, by his counsel, duly excepted.

The prisoner, by his counsel, moved to set aside and quash the indictment, on the ground that several separate and distinct offences with different punishments were charged therein. The court denied the motion, and the prisoner excepted.

The counsel for the prisoner then asked the court to compel the District Attorney to elect upon which count or charge in said indictment he would try the prisoner. The court refused, and the prisoner excepted.

The evidence showed that the prisoner and the prosecutor, fought by arrangement, in a room without witnesses. The

Nelson v. The People.

prosecutor was very badly cut in the face, but whether with a knife—as was charged in the seventh count of the indictment—or with some other instrument, was uncertain.

At the close of the evidence, the District Attorney gave notice that he abandoned the first six counts, and only claimed a conviction on the last two: and the court charged the jury on the last two counts.

The jury retired, and after consultation came into court, and on being called upon for their verdict, answered: "We find the defendant guilty of assault and battery with intent to do bodily harm with some sharp, dangerous instrument." The court refused to receive the verdict; and directed the jury to amend it, and if they intended to find the defendant guilty of the offence charged in the seventh and eighth counts in the indictment, to reconsider their verdict and respond directly to those counts; to which refusal to receive, and direction to amend, the counsel for the defendant did then and there object and except. Whereupon the jury consulted together in the box, without leaving court, and after such consultation the foreman announced that the jury could not agree to find the defendant guilty under the seventh count. The court then directed them to retire again; to which the defendant, by his counsel, did duly object and except. The jury again retired, and after being absent a few minutes returned and rendered the following verdict: "We find the defendant guilty of the offence charged in the eighth count of the indictment;" to which finding and verdict the defendant excepted. The judgment having been affirmed at general term in the sixth district, the prisoner brought error to this court.

Burditt & Lymes, for the plaintiff in error.

E. Countryman, District Attorney, for the People.

JAMES, J. The objection that the Court of Sessions as organized had no authority or jurisdiction to try the prisoner, was not well taken. The Constitution (Art. 6, § 14) declares that "the County Judge with two Justices of the Peace, to be

Nelson v. The People.

designated by law, may hold courts of sessions," &c. The County Judge and two Justices of the Peace constituted this court. But it is insisted that the justices designated were not qualified according to law, because chapter 280, section 14 of the Laws of 1847, as amended by chapter 470, section 34 of the laws of the same year declare that no Justice of the Peace shall be designated as Justice of the Sessions unless he shall be entitled to serve as a Justice of the Peace during such year by virtue of the election under which he shall be acting as such justice at the time of his designation; and neither of the persons who sat on the trial of this cause as justices were within the requirement.

A sufficient answer to this objection is, that Brown and Richardson, if not Justices of the Sessions *de jure*, were at least Justices of the Sessions *de facto*, with color of legal title; and, as was said by BRONSON, J., in the *People v. White* (24 Wend., 525), "no principle is better settled than that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done." It would be impossible to maintain the supremacy of the laws if individuals were at liberty, in this collateral manner, to question the authority of those who, in fact, hold public offices under color of legal title.

But conceding Brown and Richardson as not eligible to designation as Justices of the Sessions, their selection as such was not, as the appellant's counsel seems to suppose, a violation of the Constitution. The Constitution only requires that Justices of the Sessions shall be Justices of the Peace. The power to provide the mode of designation rested with the legislature, which might be declared by general, or special laws. The requirement that persons selected as Justices of the Sessions should have a certain period to serve as Justices of the Peace when designated, was imposed by the statute and not by the Constitution. Being a legislative requirement, the legislature had the power to modify or repeal it as to the whole State, or as to any single county thereof; and having modified it as applicable to Otsego county for the year 1860, the designation

of Brown and Richardson was lawful, and those persons were Justices of Sessions *de jure*, as well as *de facto*.

The act of modification declared that said justices might take the oath of office prescribed by the Constitution before the first day of March, 1860, and it was further objected that it was not shown they had done so. The proof rested upon the prisoner; and in the absence of proof to the contrary, the presumption is that officers, acting as such, have taken the proper oath. (1 Hill, 159; 21 Wend., 47; 8 Hill, 75; 22 Barb., 656.) But Justices of the Sessions are not required either by the Constitution or the statute to take any official oath. They take the oath of office as Justice of the Peace. On being designated they take their seats as Justices of the Sessions, by virtue of their office of Justice of the Peace. A further answer is, that this point was not made on the trial, and, as it might have been obviated by proof, it cannot be raised on this appeal. (2 Kern., 486.)

All the eight counts in the indictment related to the same offence or criminal transaction. The first, second, third and sixth counts charged the prisoner with an assault and battery with intent to kill; the fourth and fifth counts with an assault and battery with intent to maim; and the seventh and eighth counts with an assault and battery with a sharp and dangerous weapon to do bodily harm. The offences charged in the seventh and eighth counts are given by the Laws of 1854, chapter 74, and it is therein declared that upon any indictment against any person for an assault with intent to kill, it shall and may be lawful for the jury to find such accused person guilty of an assault according to the provisions of said act.

But there is no objection to a prisoner being charged with the same offence in different ways, by several counts in the same indictment in order to meet the facts of the case (Barb. Cr. Law, 840; 12 Wend., 425); and it is a matter entirely within the discretion of the court whether it will compel the prosecutor to elect upon which count he will proceed. (3 Hill, 169; 1st Park. Cr. R., 154.) Such election can only be claimed

Beekman v. Bonsor.

on motion, when the several counts charge separate and distinct offences.

The prosecutor, at the close of the case, having withdrawn from the consideration of the jury all the counts but the seventh and eighth, the prisoner could only be convicted under one or both of these counts. The finding of the jury as first rendered to the court was not in the language of the statute nor in the language of either count, and perhaps did not show, that any offence had been committed. At all events, the court did right to refuse the verdict, and send the jury back with instructions to respond to the counts under which the cause was submitted to them.

Whether, or not, the evidence was sufficient to show that the weapon used by the prisoner was sharp or dangerous, or that it was the intent of the prisoner to do bodily harm with a sharp and dangerous weapon was solely a question of fact for the jury, and cannot be reviewed in this court.

None of the exceptions made by the prisoner were well taken, and therefore the judgment below is affirmed.

All the judges concurring,

Judgment affirmed.

23	298
108	329
108	330
108	333
23	298
113	356
23	298
126	245

23 298
78 AD*228

**BEEKMAN administrator, v SAMUEL BONSOR, THE PEOPLE
OF THE STATE OF NEW YORK *et al.***

A gift to charity which is void at law for want of an ascertained beneficiary will be upheld by the courts of this State, if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite.

In other respects charitable trusts are subject to the rules which appertain to trusts in general. The trust must be capable of execution by a judicial decree in affirmance of the gift as the donor made it. The *cy pres* power, as exercised in England in cases of charity, has no existence in the jurisprudence of this State.

A charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, is void, and the

Beekman v. Bonsor.

next of kin are entitled to the fund. It seems that such a defect is incurable even by the *cy pres* power.

An executor who renounces his office, the renunciation being followed by many years of total non-interference with the estate, is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary.

A gift to executors of money, to be applied in their discretion to the use of societies for the support of indigent and respectable females, without further designation of the beneficiaries, the executors having renounced the trust, cannot be upheld.

Where a residuum of personal estate is disposed of by a will in two parts, and the first disposition is invalid, the sum does not go to the legatee of the other part but goes to the next of kin.

And where the sum devoted to the invalid prior purpose cannot be ascertained by reason of the failure of that purpose or otherwise, the gift of the remainder is void for uncertainty in the amount.

A bequest of a sum of money to be invested in land, of which the rents and profits are to be applied to certain beneficiaries during fifteen years, the land then to be sold and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation.

And where such a bequest leaves the sum not exceeding a certain limit, in the discretion of executors and the executors have renounced, the gift cannot be sustained as a pecuniary legacy by disregarding the void directions to convert it into land, and then to re-convert it into money. The amount being unascertained, the bequest wholly fails.

A bequest of money to be laid out in lands for the benefit of aliens who are to have the possession and enjoyment, contravenes the statute of wills and is void.

APPEAL from the Supreme Court. The complaint was filed in 1851, by the plaintiff, as administrator with the will annexed, to procure a judicial construction of the last will and testament of William Barthrop, late of Kinderhook in the county of Columbia, deceased. The facts, so far as material to the questions involved, are as follows:

William Barthrop, the testator, died at Kinderhook on the 20th of October, 1838, leaving real and personal estate which amounted to about \$200,000, and nearly all of which was personal estate.

Previous to his death he made a will with several codicils, the provisions of which (so far as material to the present case) are the following.

Beekman v. Bonsor

In a codicil to the will, bearing date May 12, 1888, is the following provision:

"I will that my executors purchase a farm in trust for the benefit of my nephews and nieces, children of my sister Mary Bonsor of Nottingham in England, not exceeding six thousand dollars, as an asylum, and it is my wish they come and occupy the same, especially my nephew Henry, but my executors must have full power over the same for fifteen years, for the benefit of all my nephews and nieces as they think fit, and after the fifteen years is expired, they may sell the same, and apportion the avails among them or their heirs or survivors as they think just, and if any of my nephews and nieces cavil or dispute with the arrangements my executors make for their mutual benefit, I will that they receive no part thereof."

The same codicil contains the following provision:

"After the expiration of ten years, or sooner, if my executors find there will be sufficient funds, I would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own homes, and also daily at the dispensary; my executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses; and should there be any overplus, my executors within fifteen years may give it to any other charitable society or societies for relieving the comfortless and indigent they shall select. I say within fifteen years from my death.

I say it is my will that my executors have a discretionary power, or a majority of them, within fifteen years after my decease to pay over what remains after all legacies are paid, the residue and remainder of moneys arising from my worldly goods and effects, to such charitable societies for indigent and respectable persons, especially females and orphans, as they in their discretion shall think of.

The final residuary clause is as follows:

"And in the second place, after satisfying the provisions in my will, in regard to the dispensary mentioned in my will, or

Beekman v. Bonsor.

in the first codicil thereto, I give and bequeath all my estate then remaining, if any there shall be, to my executors in trust, that they shall and may pay and apply the same in such sums, and at such time and times as in their discretion they shall think fit and proper, to the treasurer or other officer having the management of the pecuniary affairs of any one or more societies for the support of indigent respectable persons, especially females and orphans, and for the use of said society or societies; hereby intending to give to my executors full discretionary power as to the disposition of the same, but so as that the same shall be applied to objects of charity."

The three provisions of the will above recited were claimed by the plaintiff to be invalid.

The testator, William Barthrop, left him surviving his widow Anna Barthrop, but no children or the representatives of any. He left no heirs-at-law capable of inheriting his real estate, nor any descendants, parent, brother or sister, nephew or niece him surviving, except a sister, Mary Bonsor of Nottingham, England, who had living several children, the nephews and nieces of the testator—all being aliens.

The will, upon the application of the executors named therein, was proved in due form as a will of both real and personal estate before the Surrogate of the county of Columbia, on the 23d day of August, 1839.

On the same day the executors named in the will renounced the office of executors; and letters of administration, with the will annexed, were issued to the widow Anna Barthrop, and her son John P. Beekman, the plaintiff.

Anna Barthrop, the widow, died intestate at Kinderhook, on the 19th day of November, 1848.

The defendants in the suit, were: The People of the State of New York, Mary Bonsor, the sister of the testator, and her children, and Thomas Beekman as administrator of Anna Barthrop, the widow. The interests of those who desired the trusts in the will sustained, were not represented, except by the Attorney-General of the State of New York, who appeared for the People.

Beekman v. Bonsor.

The cause was heard before Mr. Justice MITCHELL, at special term. He made a decree, sustaining the validity of the provisions relating to the public dispensary, and also the residuary clause, and directing them to be carried into execution.

The provision as to the purchase of the farm was declared void.

He further decided that the plaintiff, as administrator with the will annexed, was entitled to execute the trusts of the will, to the same extent as if he had been named as an executor.

Upon several appeals taken by all the parties from the judgment, or parts of it, the cause was heard at general term, and the judgment below reversed, and a decree made declaring the will void, and that Barthrop died intestate, as to all his real and personal estate not specifically given and devised, and that the residue, being wholly personal estate, went to his next of kin.

The People of the State of New York appealed from the whole of this judgment; and the defendants Samuel Bonsor and others appealed from that part of the judgment which declares void that clause of the will which provides for the purchase of a farm for the benefit of the testator's nephews and nieces.

John H. Reynolds, for the People, appellants.

A. Underhill, for the Bonsors, submitted a printed argument.

John Van Buren and *William Curtis Noyes*, for the respondent.

COMSTOCK, Ch. J. It will be convenient to consider, first, that part of the will which relates to the establishment of a dispensary for indigent sick and lame persons. By that provision the testator declared that he "would wish a public dispensary, as in New York, on a similar plan, for indigent persons, both sick and lame, to be attended, by a physician elected to the establishment, at their own houses, and also daily

Beekman v. Bonsor.

at the establishment. My executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses." According to one construction of this clause—a construction certainly plausible—a discretion was reposed in the executors to determine the location of the proposed establishment, its extent and particular characteristics, and the amount of funds to be devoted to the object. The actual exercise of that discretion by those in whom it was confided might, by rendering uncertainty certain, relieve the bequest from the objections arising out of its vague and indefinite character. The will of a testator may be ascertained by the acts of those to whom he has entrusted discretion and power. Such acts may be justly regarded as the definite expression of his own purpose.

But, in this view of the present question, the objections encountered are, that the discretion was personal to the individuals appointed to be executors, and that they renounced the trust. That the discretion was personal, and not official, it hardly needs argument to prove. The duties to be performed were of a responsible and delicate character; and they were certainly distinct from those which are usually devolved on the office of executor. For the performance of these duties, the testator selected the persons in whose integrity and fitness he was willing to confide; and he made no provision for a devolution of the trust upon any one else in any event whatever. The plaintiff is the administrator with the will annexed: but he cannot, in that character, execute powers and trusts which were personal to the executors who have renounced. The statute, it is true, provides that, "in all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed; and the administrators with such wills shall have the same rights and powers, and be subject to the same duties, as if they had been named executors in such will." (2 R. S., p. 72, § 22.) This statute has not been understood as introducing any new principle of law. (*Dimmick v. Michael*, 4 Sandf. S. C., 409, 410; *Edgerton's Adm'rs v. Conklin*, 25 Wend., 233.) Its terms, broad

Beckman v. Bonsor.

as they are, do not embrace a case like the present. "The will of the deceased shall be observed," &c. But the precise difficulty here is, that the will of the testator, in the respect under consideration, has not been declared. His intentions, as we are now assuming, were indefinite and unexpressed, and were to take a determinate form and expression only in the discretionary acts of the persons named as executors. Trusts and powers, perfectly defined, relating to the personal estate of a testator, without doubt devolve on the administrator *cum testamento annexo*. But he does not, in virtue of his office, succeed to a power which is personal in its very nature, and which is intended by its author to be executed only by the individuals to whom he has intrusted it.

The written renunciation of the executors, filed in the office of the Surrogate, was, in terms, of their office as such. That renunciation has been followed by twenty years of non-interference with the estate of the decedent, in any character whatsoever. They have never taken any step in the direction of giving effect to the charities confided to their judgment and discretion. In behalf of these charities it has been argued that, although the assets of the deceased passed into the hands of the administrator, yet the personal trust reposed in the executors still lives, and is capable of execution. But their renunciation of the executorial office, followed by this long period of inactivity, can mean no less than an absolute and final abdication of the trusts contained in the will. They had a right to take that course. Conceding that they might, if they had chosen so to do, devise a plan for a dispensary, appoint the place of its location, and designate the necessary amount of funds, so that a court of equity might compel the administrator to appropriate the sum required, yet they were under no legal obligation to perform these acts. Having refused to qualify as executors, they never became accountable for any portion of the estate to be applied in charity or otherwise. Rejecting, then, the estate and the executorial duties which the testator wished to cast upon them, they certainly were not bound to accept any peculiar and still more confidential rela-

Beckman v. Benson

tions which the will proposed. A testamentary direction, requiring some portion of an estate to be applied by the executor to a charitable object—the plan of the charity and the sum necessary for its execution to be designated by some person not the executor—might perhaps be enforced, if the person named elected to accept the personal trust and make the designation or appointment. But it is extremely plain that such acceptance must be voluntary. The right of renouncing a trust which has no necessary connection with the office of executor is no less clear than the right of renouncing the office itself; and, in either instance, the right rests upon the very simple and elementary proposition that no man can be compelled, against his own will, to execute the testamentary wishes of another. (*Burritt v. Stillman*, 8 Kern., 98.)

The argument, therefore, for sustaining this provision of the will, founded on a supposed discretion in the executors, the exercise of which might render the testator's wishes definite and certain, must fall to the ground. Upon all the facts before us, their renunciation of all right or intention to act must be deemed final and the discretion extinct and gone. Intestacy as to any portion of the estate designed for the dispensary is the necessary result; because, in this view of the subject, the testator has failed to speak. (*Fontain v. Ravenel*, 17 How. U. S., 869.) I am speaking here of intestacy according to legal rules. The *cy pres* power of courts of equity, where charity is the purpose or object of a bequest which is void or inoperative at law, will be hereafter considered.

If, taking another view of the provision in question, we say that the executors were not appointed to be the authors of a scheme for the proposed dispensary, with discretionary powers as to the amount of endowment and other circumstances, we shall find the difficulties still more obvious. All that we can ascertain from the language of the testator is, that he had in his mind a vague and shadowy conception of a dispensary, similar to those in the city of New York, without any determinate views as to the place of its foundation, the mode of perpetuating and governing it, or the amount of expenditure

Beekman v. Bonsor.

and investment necessary to establish and maintain it. Putting aside, as we now do, the idea of a delegated discretion which might cure these defects, there are wanting all the elements of certainty which are necessary to impart validity to this bequest. The testator, in effect, declared that he devoted a blank sum of money to found and perpetuate an institution of charity, which, in his mind, was also a blank as to every thing except the general purpose which he designed to promote. Here is a fatal uncertainty, both as to the subject and the object of the bequest. It needs no authority to prove that such a provision is void, when tested by the rules of law. If the testator neither specified how much of his estate he desired to give to this charity, nor furnished the means of ascertaining the sum through a delegated discretion or otherwise, the legal result plainly is that he gave nothing at all, and his next of kin are entitled to take the fund. The same conclusion may be derived from the consideration that there is no donee of the gift; by which is meant a donee to take the legal interest in the fund, and apply and dispense it in furtherance of the testator's charitable intent. Of course, the executors, if they had qualified, would have taken the legal interest in all the testator's personal estate in virtue of their office. But they were not appointed the trustees of this charity, nor was the fund specially bequeathed to them in that character. They might consult with judicious men, and perhaps determine, in their discretion, upon some plan of the charity, and upon the sum of money required to effectuate it. But there, their duties and powers would end, because they are not appointed to take the title of the proposed establishment, or to retain and invest the capital sum necessary to support it. In this respect, the will is a blank. As there is no person or corporate body appointed to take the bequest, the necessary legal consequence is that it fails altogether.

There is, then, no principle of law or rule of equity regulating trusts, other than charitable, which will support this bequest. The inquiry, therefore, now is, whether there is anything in the law of charitable uses, as a peculiar system, by

which it can be sustained. The English law on this subject is derived from the jurisdiction of the Court of Chancery over trusts; from the prerogative of the Crown, and from the statute of 43 Elizabeth, chapter 4. (*Owens v. The Missionary Society*, 14 N. Y., 387.) In this State we have no royal prerogative, and the statute of Elizabeth was repealed by the legislature in 1788. Our system of charity law, therefore, derives nothing from either of these two sources; and its origin must, consequently, be referred to the jurisdiction which the English Court of Chancery exercised, independently of prerogative and of the statute of Elizabeth. What was the extent of that jurisdiction over charitable trusts? Was it restricted precisely by the rules which regulate other trusts? Did it transcend those rules? and, if so, to what extent and in what cases? These are inquiries which have occupied the ablest judicial minds in this country, and great diversity of opinion has been the result. This diversity, perhaps, sufficiently proves that the inquiries are incapable of a perfectly exact solution. Nor is such a solution of fundamental importance. The courts of this State will confine themselves to powers which are strictly judicial; and, under that limitation, they may be deemed competent to determine what is and what is not a valid and effectual charitable donation. The English system of law on this subject, derived from the three sources mentioned, is confessedly much more comprehensive than ours. If we are unable to ascertain with entire accuracy how much of that system is derived from any one of these sources in exclusion of the others, we may, at least, determine how much of the blended mass is adapted to our own situation and wants, being careful, however, not to transcend the limits of judicial authority.

There are two cases, recently decided in this court, which deserve a particular attention, because the principles expressly asserted in the one, and conceded, if not affirmed, in the other, are decisive of the present question. In *Williams v. Williams* (4 Seld., 527), a testator bequeathed the sum of \$6,000 to three trustees as a fund for the education of poor children at the

Beekman v. Bonsor.

academy in the village of Huntington, to be taken from those whose parents' names were not in the tax-list. The trustees, to whom the legacy was given, were constituted a board for the management of the fund; and, as vacancies might occur, the mode of supplying them in perpetuity was pointed out. Particular directions were given for the investment of the sum, and the accumulation and appropriation of the interest. In the opinion of the court, delivered by Judge DENIO, it was assumed that the bequest, according to the general rules of law, would be void for want of an ascertained *cestui que trust*, in whom the equitable title would vest (p. 540); it being justly considered that the "children of the poor" were quite too indefinite a class to be entitled in law to take as beneficiaries. Notwithstanding this assumption, the bequest was sustained. The learned judge examined at some length the English doctrine of charitable uses, and he stated his conclusion to be, that the law of charities was, at an indefinite but early period, ingrafted upon the common law, and that the statute of Elizabeth was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations understood to be valid by the laws antecedently in force (p. 542). / The opinion, however, not merely
+ conceded, but maintained, that, under our political system, with its precise distribution of the powers of government, the English law on this subject is in force here only so far as it is capable of administration in the exercise of strictly judicial power. "We have no magistrate," it was observed, "clothed with the prerogatives of the Crown, and our courts of justice are entrusted only with judicial authority." The *cy pres* doctrine of the English Chancery, in other words the right of making an approximate or discretionary will for a testator, where he has only declared some indefinite, illegal, or ineffectual charitable purpose, was distinctly disavowed. The case itself must be viewed as a well-considered authority for the proposition that a charitable gift, definite both in its subject and purpose, and made to a definite trustee, who is to receive the fund and apply it in the manner specified, is to be maintained, although

Beekman v. Benson.

it would be void by the general rules of law, because the particular objects of the gift, or persons to be benefited by it, are unascertained. Such a gift is capable of being enforced by a judicial sentence; and it affords neither room nor justification for an exercise of the *cy pres* power. So much, then, of that which is peculiar in the English system of charitable trusts ought to be considered as settled in the jurisprudence of this State. But beyond this we cannot go, without exercising functions which are not judicial; which, in England, rest on prerogative, and are there exercised by the sign-manual of the Sovereign, or by the Court of Chancery, as the keeper of his conscience. +

The other case to be particularly noticed is *Owens v. The Missionary Society of The Methodist Episcopal Church*, determined three years later (14 N. Y., 380). In that case the bequest was of the residue of the testator's estate to "The Methodist General American Missionary Society appointed to preach the gospel to the poor, L. C." That society was unincorporated at the time of the testator's decease, and the gift was directly to it, without the intervention of any trustee to take and administer the fund and maintain the charity. An opinion, concurred in by a majority of this court, was delivered by Judge SELDEN, in which, with great learning and research, he traced the jurisdiction of the English Chancery over charitable uses to its respective sources; and he came to the conclusion that the peculiar features of that system of law were derived from the statute of 43 Elizabeth, and, consequently, that those peculiarities are no part of the law of this State. The bequest was adjudged to be void; a majority of the judges assenting to that conclusion, not only upon the basis laid down in that opinion, but also on the ground that the indefiniteness of the charitable purpose indicated by the testator would vitiate the gift, even according to the English law. There is certainly a want of coincidence between the opinion of Judge SELDEN and that of Judge DENIO, in the previous case, upon a question of juridical history, which I am inclined to think is not one of fundamental importance. We are justified in so thinking,

Beekman v. Bonsor.

because the diversity of views on that question led to no practical difference in conclusion or result. The authority of *Williams v. Williams* was conceded in the later case, the distinction taken being, that, in the one case, there was a competent trustee of the fund, while, in the other, there was not. And, to avoid all misapprehension, Judge SELDEN qualified the result of his opinion by conceding that "courts of equity in this State have power to enforce the execution of trusts created for public and charitable purposes in cases where the fund is given to a trustee competent to take, and where the charitable use is so far defined as to be capable of being specifically executed by the authority of the court, even although no certain beneficiary, other than the public at large, may be designated." Now, this concession yields all that was claimed or determined in the previous case, while the concession in that case yields all that was determined in this. The joint authority of both decisions establishes these propositions: 1. That a gift to charity is maintainable in this State if made to a competent trustee, and if so defined that it can be executed as made by the donor by a judicial decree, although it may be void according to general rules of law for want of an ascertained beneficiary; 2. In other respects, the rules of law applicable to charitable uses are within those which appertain to trusts in general; 3. The *cy pres* power, which constitutes the peculiar feature of the English system, and is exerted in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this State on this subject. We ought to accept these rules as the law of this State, because they are the necessary result of the carefully considered decisions of this court which have been mentioned; and we think that a reëxamination of the principles and authorities on which those decisions were based, would now be inappropriate.

It is an obvious conclusion from these premises, that the law of charities cannot be invoked in aid of the bequest now under consideration. It has been shown that, in one view of the

Beekman v. Bonsor.

will, the consummation of the testator's charitable purpose was referred to the judgment and discretion of the executors, and that the purpose has failed by their renunciation. As judicial power is exercised in the interpretation of wills, and in establishing them as made by testators, and not in framing them, this difficulty is incurable. In England the *cy pres* power would be exerted in such a case; and a scheme would be devised by a master of the Court of Chancery, or the Crown would appoint the charity under the sign-manual. In either mode of exercising that power, it rests upon prerogative, and is a creative energy, which, as we have seen, does not belong to our judicial system. In *Fontain v. Ravenel (supra)*, the testator gave the residue of his estate to his executors to be disposed of for the use of such charitable institutions in Pennsylvania and South Carolina as they should deem most beneficial to mankind. Here was a power of selection to be exercised in the discretion of the executors. But they died before the period arrived when the selection could be made. The gift, therefore, could not be executed as the testator made it, and it was held that his heirs, or next of kin, were entitled to the fund. So, in this case, the executors having renounced, the discretion in which the testator confided is dead, and there is no power in us to reconstruct the gift which has failed as he intended to make it. And if we lay out of view the element of discretion, either as not conferred by the will or as extinct by renunciation, we encounter a defect which would not be remediable even according to the *cy pres* doctrine. The subject of the bequest, or thing intended to be given, is undefined. Of course, it was money, to be expended in founding and maintaining a dispensary; but there are no means of ascertaining the sum which the testator intended to give. In such a case, even prerogative would hesitate to declare how much of the estate should be taken from those who are by law entitled to all that is not effectually disposed of by the testator himself; and I think that, among all the extreme cases determined by the English courts in favor of charities, none can be found giving effect to a gift which is void in law for the reason

Beekman v. Bonsor.

here suggested. It is the indefiniteness of the object and purpose of a charitable donation, and the impossibility of effectuating it as the donor intended, which have furnished occasion in so many cases for the exercise of the *cy pres* power. But, in all the cases, I think it will be found that the donor did not leave in hopeless uncertainty the gift itself.

The sum intended for the dispensary was to be taken from the residuum of the testator's estate, after satisfying certain enumerated legacies. That object being provided for, the testator then bequeathed his remaining estate to his executors in trust, to apply the same, in their discretion, as "they should think fit and proper," to the treasurer or other officer having the pecuniary management of any one or more societies for the support of indigent and respectable persons, especially females and orphans, and for the use of said societies; and he declared it to be his intention to give to his executors discretionary power as to the disposition of the fund, so that it be applied to objects of charity. This provision will require but a brief consideration. The first inquiry is, whether the sum designed for a dispensary, in consequence of the failure of that purpose, goes to the next of kin as undisposed of, or falls into the ultimate remainder under this clause. If the latter, then the whole residue of the estate, after satisfying the specific bequests, is given to the executors for the charitable purposes mentioned in the final clause. But such is not the construction or effect of this provision. The general rule undoubtedly is, that, in a will of personal estate, a general residuary clause carries to the residuary legatees whatever is not otherwise legally and effectually disposed of. Such is the presumed intention of the testator in most cases. But the authorities do not apply this doctrine where the bequest is of the residue of a residue and the first disposition fails. The opposite rule, I think, universally prevails in such cases. In the case of *Skrymsher v. Northcote* (1 Swanst., 570), the Master of the Rolls said: "It seems clear on the authorities that a part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts as a residue of a residue; but, instead of resuming the

nature of residue, devolves as undisposed of." (Ward on Legacies, 32, and cases cited, 18 Law Lib.; *Floyd v. Barker*, 1 Paige, 480; *Attorney-General v. Davies*, 9 Ves., 535.)

Now, we have seen that the sum which the testator intended to give for a dispensary was wholly uncertain in amount, and that the bequest was void on that and other grounds. As that portion of the residuum must go to the next of kin as undisposed of the final gift of the remainder involves precisely the same uncertainty, and is void for the same reason. In order to ascertain the amount of this gift, the sum intended to be previously appropriated out of the whole residue must first be known. But, as that cannot be known, the ultimate bequest falls to the ground also. This is clear in reason and logic, and it is well settled by authority. In *Chapman v. Brown* (6 Ves., 404), a testatrix gave a residue of her estate to her executors in trust, 1st, to build a chapel, but devoting no particular sum to that object; 2d, if there should be any overplus, for the support of a preacher, not exceeding £20 a year; and, 3d, if any further overplus, the sum was to be expended in such charities as the executors should think proper. Here was a residuum divided into three parts. The first gift was adjudged void, as against the laws of mortmain. The second, being dependent upon the first, failed also. As the chapel could not be built, no preacher was wanted. The third and last, standing by itself, was conceded to be good, according to the law of charitable uses in England. But the objection to it was, that the amount of that bequest could not be ascertained without first determining what sum would have been required to build the chapel, which, together with the £20 per annum for the preacher, did not fall into the ultimate residuum, but went to the heirs and next of kin. But that sum was held to be incapable of ascertainment, because the chapel was not to be built, and the final remainder to general charity was therefore equally uncertain. That bequest was also adjudged to be void on this ground alone, and the whole residuary estate was consequently declared to be undisposed of by the will. This decision, which has always been recognized as a sound one, not only establishes

Beekman v. Bonsor.

the point to which it is here cited, but it verifies also the observation before made, that a legal uncertainty in the subject of a gift is incurable, even by the law of charities in England. A similar decision was made in the case of *The Attorney-General v. Hinzman* (2 Jac. & Walk., 270). Again, it was held, in *Limbrey v. Gurr* (6 Madd., 151), that, where a residue is given to a valid purpose, it fails with a prior void purpose, if not capable of being ascertained except by the actual execution of that purpose. The valid purpose in that case was also a charity.

The final bequest, therefore, in the case now before us, was void for the reason that the remainder of the residuary estate intended to pass to the executors under that bequest, is incapable of being ascertained. It is also void by reason of the indefiniteness of the object of the gift. If this defect could be aided by an exercise of the unlimited discretion reposed in the executors, to whom the fund was given in trust, they have renounced, not only as executors but as residuary legatees in trust also. On this branch of the question, enough has been said in examining the provision in regard to the dispensary.

The remaining question arises upon the provision which directed the executors to purchase a farm in trust for the benefit of the testator's nephews and nieces. I am of opinion that this clause was intended to create an express trust to receive the rents and profits of land, and apply them to the use of the beneficiaries designated; and, consequently, that the trust, in its nature and kind, is permitted by our statute of uses and trusts. (1 R. S., 728, § 55.) No technical or precise words are necessary in order to constitute such a trust. If the direction is such as to vest the title in the trustee; if his duties are active instead of passive; and if the possession is subjected to his control, so that he may, in his pleasure or discretion, exclude the beneficiary therefrom; and if, with these directions, there is no other declared purpose of the testator, a trust to receive the rents and profits is the necessary result of the arrangement. Rents and profits are the incidents of the possessory right; and, certainly, it is the duty of the trustee to pay them over,

or apply them to the use of the person for whose benefit the grant or devise is made.

In this case, the direction of the testator to the executors was to invest \$6,000 in the purchase of a farm in trust, &c. The meaning of this plainly is, that they were to take the legal title to themselves as trustees. The beneficiaries of this trust were the nephews and nieces of the testator, and a "wish" is expressed that they should "come and occupy" the farm; but this wish is qualified by an explicit declaration that such occupancy shall be subject to the absolute control of the executors, whose directions are to be followed without "cavil or dispute." They were to be, therefore, not merely passive trustees. Their duties were active, and they consisted in controlling the possession at their discretion for the benefit of the *cestuis que trust*. The latter were entitled only to the results, in other words to the rents and profits. These they might receive directly as occupants, if the trustees permitted, or they might take them from the hands of the trustees themselves. Undoubtedly, a trust to receive and apply the rents and profits of land may be executed in either of these modes; and the expression of a wish by a testator in favor of one mode rather than the other does not deprive the trust of its real character, so long as the wish is so qualified as not to interfere with the discretion and power of the trustee.

But this trust, although, as to its nature and kind, falling within the permitted class, is invalid, because it proposed an illegal suspension of the power of alienation. If the farm had been purchased according to the direction, both the legal estate of the trustees and the beneficial interest of the *cestuis que trust* would have been inalienable for a term of fifteen years. The beneficial interest in a trust to receive rents and profits is unassignable; and, inasmuch as the trust declared by the testator in this case ought to appear on the face of the conveyance to the executors, any sale of the legal estate by them within the fifteen years would be in contravention of such trust, and would be void. (1 R. S., 730, §§ 63, 64, 65; *Hawley v. James*, 16 Wend., 61.) But, with one exception,

Beekman v. Bonsor.

not now material, the absolute power of alienation cannot be suspended for a longer period than during the continuance of not more than two lives in being at the creation of the estate. (1 R. S., 723, § 15.) It has been repeatedly adjudged that any attempted suspension of this power, not dependent on lives, but for an absolute term of time, whether long or short, is a violation of the letter and policy of this provision of law. (*Hawley v. James*, *supra*; *Boynston v. Hoyt*, 1 Denio, 53.) It seems to result, necessarily, that the direction in this will to invest the \$6,000 in a farm upon the trusts mentioned was contrary to the statute and void. This conclusion being clear, if I am right as to the trust and its character, it becomes unnecessary to inquire whether a trust to receive the rents and profits of land and apply them to the use of an alien beneficiary would be valid, if the trust were so constituted as to be free from any other objections.

If I am mistaken in supposing that the trust in question is of the character mentioned, and void as an attempt to suspend the power of alienation, the only alternative construction is, that the nephews and nieces of the testator (but for the difficulty arising from their alienage) would have been entitled, if the farm had been purchased, to the possession and to the rents and profits in exclusion of the executors. In that view, the trust attempted to be created would have been passive, and the nephews and nieces would take the legal estate. In this aspect the trust would not be illegal or void, but the use would be executed by the statute of uses and trusts, and the legal title would vest in the beneficiaries. (1 R. S., 727, §§ 47, 49.) The objection that they were aliens, however, stands in the way, not of this construction, but of the consequences which flow from it, because the statute of wills declares that a devise to an alien of any interest in land shall be void. (2 R. S., 57, § 4.) A direction in a will that money be laid out in land to be conveyed to or for the benefit of an alien, so as to invest him with the possession and the rents and profits, would undoubtedly fall within that provision. It is impossible, therefore, in any view, to uphold this direction of the will.

Beekman v. Bonser.

At the end of the fifteen years, the executors were authorized to sell the land and distribute the proceeds among the nephews and nieces. This would have been a lawful trust, or power in trust, if the postponement of its execution for an absolute period of time did not suspend the power of alienation in a manner which the statute does not permit. That suspension is fatal to this trust also. It is to be observed, moreover, that, inasmuch as the direction to purchase the land cannot be executed, for the reasons which have been given, so the authority to sell it and divide the proceeds necessarily falls to the ground with that direction.

The intention of the testator was, that a sum of money should be laid out in land, and the rents and profits enjoyed by his nephews and nieces for fifteen years; that the land should then be reconverted, and the money divided among them. The design to give the money to them was strictly lawful; and my first impression was, that the final bequest might take effect in their favor as a vested legacy, payable at the end of fifteen years from the testator's decease. To reach such a result, it is not required to execute the unlawful direction to purchase and hold the land and then to sell and reconvert it. No conversion being in judgment of law possible, no reconversion is either necessary or possible. Disregarding those directions, the original gift was of money, and it was to be finally paid over in money at a certain future period. So much of the testator's intention might, therefore, be effectuated consistently with the rules of law, and without disturbing any other portion of his will. In this view of the subject, I think the legacy was vested in the beneficiaries in equal shares, subject to be divested as to the equality of division by an exercise of the discretionary power of apportionment given to the trustees. (1 Roper on Legacies, 400, 402, 1st Am. ed.; Hill on Trustees, 79, and cases cited; *Dominick v. Sayre*, 3 Sandf. S. C., 555.) I had proposed, therefore, to give effect, in the manner here suggested, to the testator's undoubted intention that his nephews and nieces should have the principal sum bequeathed, at the end of fifteen years. But my brethren find

Roosevelt v. Draper.

a difficulty which they think cannot be overcome. The direction is to invest a sum not exceeding \$6,000 in a farm, &c. The maximum limit is fixed; but below that, the amount to be thus invested was left wholly in the discretion of the executors. They might purchase a farm of any value below \$6,000. This discretion cannot now be exercised, because the executors have renounced. It was never capable of being exercised, because, as we have seen, the direction itself was unlawful and void. Viewing the bequest, therefore, as a vested pecuniary legacy, the sum given appears to be wholly undefined, and I acquiesce in the suggestion that this is fatal to the gift. The judgment of the Supreme Court must be affirmed.

All the judges agreed that the trust for the benefit of the nephews and nieces was void for the reason last assigned; all except DENIO and MASON, Js., who adhered to the views expressed by the former in *Williams v. Williams* (4 Seld., 527), concurred in the opinion of COMSTOCK, Ch. J.; SELDEN, J., however, took exception to some of its language in respect to the *cy pres* doctrine, holding that the Court of Chancery, in supplying defects of detail in the directions for the execution of the trust by means of a scheme, exercised a power which was purely judicial, and to which our courts have succeeded.

Judgment affirmed.

ROOSEVELT v. DRAPER *et al.*

There is no distinction between a municipal corporation and towns or counties, which enables a taxable inhabitant of the former to maintain an action to restrain or avoid a corporate act, not affecting his private interest, as distinct from that of other inhabitants.

Nor can such a suit be maintained by an inhabitant who is also a creditor, holding the public stock of the corporation, to avoid an alienation of its property upon which he has no specific or general lien, and which is not shown to be essential to the security of the corporate creditors.

Roosevelt v. Draper.

A Governor of the Almshouse is one of the heads of departments, and an officer of the city of New York, prohibited by chapter 187 of 1849, section 19, from being interested in the purchase of any real estate belonging to the corporation.

APPEAL from the Supreme Court. Action to obtain a judgment of the court declaring void and setting aside a conveyance made by the corporation of the city of New York, under the common seal and the signatures of the Mayor and the Clerk of the Common Council, of a piece of land to be made, under the waters of the North river, and situated between Gansevoort street and Twelfth street, to the defendant, Joseph B. Varnum, and which he had conveyed to the defendant Coleman. The city was the owner of the adjacent uplands, which gave it and its grantee the right to sink bulkheads and make dry land of that which was under water. Simeon Draper was made a defendant, on the allegation that he was influential in procuring the conveyance and was interested in the purchase, and that, being one of the Governors of the Almshouse, he was prohibited by law from being a party in interest to a purchase of any of the property of the city. The plaintiff averred that he was a resident and taxpayer of the city of New York, owning real and personal property situated therein, and paying taxes thereon, and also that, as the holder and owner of a portion of the city stock, he was a creditor of the city to the amount of more than \$100, which debt was payable with annual interest.

To show that the sale was illegal, the complaint referred to and stated some of the provisions of an ordinance of the Common Council, relating to the sinking fund, adopted in 1844. (Revised Ordinances of 1845, p. 212.) So far as it is material to the present question, it declares that all money thereafter to be received from certain specified sources of revenue was thereby pledged to and constituted the sinking fund for the payment of the city debt, until the same should be redeemed; and among the sources mentioned are "the net proceeds of all sales of real estate belonging to the corporation, when sold." By another provision, certain other sources of revenue, includ-

Roosevelt v. Draper.

ing the sales of all property of the corporation other than real estate, were pledged to the payment of interest on the city stock. There is then a series of detailed provisions respecting the disposition of the real estate, (tit. 4) and among these are the directions respecting grants of lands under water on the shores of the island of New York. (Id., §§ 11, 12.) In all cases of such grants, it is provided that the Comptroller and Street Commissioner are to report to the Commissioners of the Sinking Fund what sum in their judgment ought to be charged as consideration for such grants; and if a majority of the Commissioners agree to those terms, the Comptroller is to cause the property to be conveyed to the parties who may be legally entitled to the same. But it is declared that these directions, "so far as the consideration money is concerned," are not to apply to grants to be made on the North river, between Hammond and Thirtieth streets, which section includes the premises in question; "but the rates to be charged for grants between said Hammond and Thirtieth streets shall be as follows for each running foot along the westerly line of the Eleventh avenue: For grants between Gansevoort and Twelfth streets, \$14." The grants to be made by virtue of these provisions are not to authorize the construction of bulkheads or the making of land without the permission first obtained of the Common Council, and then the work is to be done in conformity with its directions.

It was further provided that interest should be reserved on the bonds and mortgages for the deferred payments, at the rate of seven per cent per annum. Section 17 of the same title authorizes the Trustees of the Sinking Fund to sell and dispose of the real estate belonging to the corporation and not in use for public purposes, at public auction, at such times and on such terms as they may deem most advantageous for the public interest, and twenty days' notice by advertisement is required to be given. No sale is, however, to be made at a less sum than the property shall be appraised at by the Commissioners of the Sinking Fund and the Street Commissioner, or a majority of them, at a meeting to be held within one

Roosevelt v. Draper.

month prior to the sale. (Tit. 4, § 17; tit. 5, § 8.) The conveyance complained of was made pursuant to a certain resolution of the Common Council, adopted December 20, 1852, by which it was resolved that the premises in question should be sold to D. R. Martin, or any other applicant for the purchase thereof; and it was "referred to the Commissioners of the Sinking Fund to fix the terms and price, the proceeds of which to be paid into the sinking fund for the redemption of the city debt." The Commissioners of the Sinking Fund fixed the price at \$160,000, requiring twenty-five per cent to be paid down, and the residue to remain on bond and mortgage for five years, with interest at the rate of six per cent per annum, and directed a conveyance upon these terms to be made to Reuben Lovejoy. There was no report as to price from the Street Commissioner or Comptroller, nor any appraisement preliminary to the sale. The Commissioners negatived a resolution to give notice of the sale by advertising, and to sell at auction, which was proposed by the Comptroller. The conveyance was, in fact, made to the defendant, Joseph B. Varnum, who executed a bond and mortgage for \$120,000, the balance of the purchase money, payable with six per cent interest. The sum of \$40,000 was paid down, and the payment was made in part, as the plaintiff believes, by the defendant Draper, who, it is alleged, was directly or indirectly interested in the property. The following averments as to the value of the property and the effect of the sale, conclude the stating part of the complaint: "And the plaintiff shows that the property sold as aforesaid is of far greater value, as he is informed and believes, than the price aforesaid, and has been estimated by persons familiar with real estate as fully worth three hundred thousand dollars." "And the plaintiff charges, upon information and belief, that the sale aforesaid was attempted without authority, and in breach of law and of trust, at the instance, under the influence and to subserve the interest, of an officer of the corporation, and that it *tended* to the sacrifice of the city property, the loss of taxpayers and ultimate injury of creditors; that the city debt now amounts to the sum of \$14,578,905, and the

Roosevelt v. Draper.

city property available to pay the same is of the value of \$7,542,103." The plaintiff insists that the conveyance is a cloud upon the title, and he prays that it may be delivered up and canceled.

The ordinance of 1844, organizing the sinking fund, is referred to in several subsequent acts of the legislature, passed to enable the city to borrow money for the introduction of the Croton water into the city. The act of 1845 (p. 247, § 5) declares that the ordinance shall remain in full force until the whole of the debt created on account of the Croton water shall be fully redeemed. (Laws of 1849, p. 128, § 5, *et seq.*; *id.*, 1851, p. 454, § 5.)

To show that the sale was illegal, the plaintiff also relied upon certain provisions of the act to amend the charter of the city of New York, passed in 1849 (ch. 187), namely: Section 19, which declares "that no member of the Common Council, *head of department*, chief of bureau, deputy thereof or clerk therein, or *other officer* of said corporation, shall be directly or indirectly interested in any contract, work or business, &c., &c., nor in the purchase of any real estate or other property belonging to the corporation, or which shall be sold for taxes or assessments;" and section 17, by which it is declared that "there shall be an executive department known as the almshouse, which shall have cognizance of all matters relating to the almshouse and prisons of the city, the chief officers whereof shall be the Governors of the Almshouse."

The defendants Draper and Coleman demurred to the complaint, on the ground that it did not, as alleged, state facts sufficient to constitute a cause of action. The case was heard before Mr. Justice MITCHELL, at a special term, who made an order overruling the demurrer; but the order was appealed from to the general term, where it was reversed, and judgment was given for the defendants dismissing the complaint, with costs. The plaintiff appealed to this court.

S. W. Roosevelt, for the appellant.

William M. Evarts, for the respondents.

Roosevelt v. Draper.

DENIO, J. Assuming that the grant of the land under water executed to the defendant Varnum may have been either void or voidable for any or all the reasons suggested in the complaint, the question which presents itself in the first instance, is whether the plaintiff sustains such a relation to the subject as will enable him to maintain a suit to set the conveyance aside. He is a resident citizen of the city of New York, and is the owner of real and personal property which is liable to be assessed for taxes therein; and he is moreover, a creditor of the city to the amount of more than \$100. The defendants' counsel maintain that neither of these characters entitle him to sue for such a cause.

I. As a resident citizen, and a person liable to be taxed, he has no other rights than such as are common to all the people of that community who own property; and we have decided upon full consideration that it requires some individual interest, distinct from that which belongs to every inhabitant of the town or county, to give the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question. (*Doolittle v. Supervisors of Broome County*, 18 N. Y., 155.) The fact of owning taxable property is not such a peculiarity as to take the case out of the rule, for all property, with very limited exceptions, is taxable, and everybody either has, or is capable of acquiring, property. Liability to contribute to the public burdens, where there are no privileged classes, is the lot of every member of the State, and a large proportion of all the acts of government, either general or local, involves questions of expenditure, and affects more or less the subject of taxation. If a plaintiff has taxable property at the time he commences his action, he may not have it when the next assessment for purposes of taxation is made; and if he have none when the act complained of is committed, he may be a large taxpayer when that act produces its result in increased taxation. The actual liability of the plaintiff to injury consists in his belonging to a community in which every person is subject to pay taxes of all he possesses. An act of administration likely to produce

Roosevelt v. Draper.

taxation is not, therefore, a matter of private or individual concern. It is an affair altogether public; and the only remedial process against an abuse of administrative power tending to taxation which one can have is furnished by the elective franchise, or a proceeding in behalf of the State, or, in the case of an act without jurisdiction, in treating the attempt to enforce the illegal tax as an act of trespass. In the case referred to, the proceeding which was drawn in question was that of the board of supervisors of a county. The reasoning by which the conclusion was reached, as well as the examination of adjudged cases, applied generally to administrative acts of municipal corporations equally with the case in hand. Still, as it had been suggested that different considerations might possibly apply where the act complained of was that of the corporation of a city, we withheld the expression of any opinion upon the alleged distinction between the cases. But having now heard this aspect of the question discussed, we are prepared to say that no such distinction exists. The counties, cities, villages and towns into which the State is divided are governed, as to matters of local policy, by the different agencies which have been created by the general or special laws of the State. In reference to towns and counties the form is, for the most part, though not entirely, uniform, but in regard to cities and villages great diversity exists, no two charters being entirely alike. The object to be obtained, however, by these different modes of carrying on the local administration is the same. The officers of municipal corporations are public officers equally with the officers of towns and counties, and the property which is subject to their control and management is public property in the same sense with the property held for public use in the towns and counties. The position insisted on by the counsel for the plaintiff, that a municipal corporation, in the management of its property, acts in a private capacity, as distinguished from the exercise of a public function, cannot be maintained. No doubt there is a difference between the faculty of passing by-laws and ordinances in the exercise of what is called the legislative powers of these corporations. and that of leasing

and selling their property and collecting the avails, but it is not that one is less a public function than the other. They are equally public acts. The distinction is, that one is a legislative and the other an executive or administrative act; but both are proceedings in the course of public administration. The cases cited for this purpose by the plaintiff's counsel do not sustain his position. In *The Presbyterian Church v. The City of New York* (5 Cow., 538), the corporation of New York, prior to the Revolution, had conveyed to the parties whom the defendant had succeeded, a parcel of building ground in the city, on which the grantee had agreed to erect a church, or to use the ground as a cemetery. The conveyance contained a covenant on the part of the city for quiet enjoyment. The legislature afterwards authorized the Common Council to prohibit burials within the city if they should find it necessary, and they did pass an ordinance which prohibited burials on those premises; and the plaintiff sued, claiming that the ordinance was a breach of the covenant. The defendants prevailed on the ground of the paramount authority of the legislature, and of the Common Council as the delegate of a portion of that authority, to pass all needful laws upon the subject of the public health and morals. They held that it extended to lands granted by the corporation equally with private grants. The case only proves that the rights which parties acquire under a grant from a public corporation, are precisely the same which they would obtain under a conveyance from any other grantor. In either case the grant would be subject to the full exercise of the law-making power, whether general or local. The State by the commissioners of the land office, every day conveys portions of the public lands to individual purchasers, but the transaction is no less an act of public administration, because the jurisdiction of the legislature over the premises is retained precisely as it would be over lands granted by private individuals. In *Bailey v. The Mayor of New York* (3 Hill, 541), Chief Justice NELSON spoke of the acts of the legislature for the introduction of the Croton water into the city, as an enterprise for the private emolument and advantage of the city, as

Roosevelt v. Draper.

well as for the public good. The investment, he said, and the revenues and profits to be derived therefrom, were a part of the private property of the city, and he repeated that the grant of power contained in the act was for purposes of private advantage and emolument. The plaintiff's counsel rely upon these expressions as proving that the city property is private in some sense which affects the present question. But the controversy in the case was whether the water commissioners, under whose directions the Croton dam was constructed, were to be considered the servants of the State or of the city. The term private was used in order to qualify the enterprise and the property which was to be created in the water-works, as a proprietary concern of the city and not of the State. A more discriminating expression might have been used, but the language as it stands is not calculated to mislead one who shall read the whole case.

The difference between a municipal corporation and the ordinary official agencies for the government of a local division of the State consists, mainly, in the capacity of the former to sue and be sued, and to contract under a common seal and in a common name. This circumstance does, no doubt, expose a community thus governed to some suits to which the latter is not exposed. Thus it has been held in a great many cases that a city, or an incorporated village, may be sued for negligence in not repairing the streets, sidewalks, &c. But this distinction does not aid the plaintiff in this case. His difficulty is, not that the corporation is not the proper party representing the public to be sued, provided a cause of action exists which the plaintiff can enforce. The defect is the want of a proper party plaintiff. The corporation represents the interest liable to be affected by the remedy sought; but the plaintiff does not represent the whole public, who are the parties claimed to be aggrieved. I am very confident that the plaintiff cannot sustain this action, in his character as a resident citizen and taxpayer.

II. The right to sue, as a creditor holding shares of the city stock, depends upon other considerations. The persons similarly situated are probably numerous; but the rights which

Roosevelt v. Draper.

they have belong to them as private individuals, and not as members of the community. If, therefore, the complaint discloses facts which would have given the plaintiff a right of action if he had been the sole creditor of the corporation, he is not, I think, precluded from suing because there are a great many others having the same common interest with him. In such a case the action may be brought by one or more for the benefit of the whole, according to section 119 of the Code, which is only the enactment of a rule as to practice which has long prevailed in courts of equity.

The question, then, is, whether the plaintiff, as a creditor, has stated a title for the relief which he claims against the defendants. His case, according to the complaint, is, briefly, that property, the proceeds of the sales of which were pledged and appropriated for the payment of the city debt, has been sold for less than its value, and that, in making the sale, precautions provided by law for securing an adequate price have not been taken. This, and the charge that an office-holder under the city government, who was prohibited by law from being concerned in the purchase of city property, was interested in this purchase, constitutes the whole of the case. It is not stated that there has been any default in the payment of interest, or that the principal of the debt has become due, nor that the debt is in any way insecure, nor that the plaintiff is under any apprehension that he will sustain a loss. It is, indeed, averred that the debt of the corporation is much larger than its property; but public or municipal debts are not based upon accumulated property, but on the faculty of taxation and the pledge of the public faith.

It will be necessary to ascertain what legal rules apply to the issuing of grants of this kind, namely, of land under water; and, upon a careful examination of the ordinance relating to the sinking fund, it will be perceived that they are distinct from those which regulate the sales of other real estate. Sections 11 to 16, inclusive, of title 4, relate to such grants. The property not required to be put up at auction, and no previous notice is necessary to be given of the time and place of sale, as is the

Roosevelt v. Draper.

case where other real estate is sold. With the exception of grants to be made in certain specified localities to be immediately noticed, the price is to be arrived at by a report of the Comptroller and Street Commissioner, confirmed by the Commissioners of the Sinking Fund. But a section of the shore of the North river is excluded from the operation of that provision, and it is declared that the rates to be charged for grants in that locality, which includes the premises in question, shall be those specified in a schedule contained in section 12. By that schedule the grant in question was to be charged for at the rate of \$14 per running foot of the westerly line of the Eleventh avenue. The length of that line is not given in the description of this grant, but the length of the westerly line of the grant, which is the Thirteenth avenue, is eight hundred and seventy feet and seven inches; and as the figure of the parcel granted shows that it increases in width as it extends towards the centre of the river, it is clear that the price obtained was many times greater than that which would result from applying the data mentioned in the ordinance. The value of this interest had doubtless greatly increased since the adoption of the ordinance. It does not follow from its provisions that the Common Council or the Commissioners of the Sinking Fund could, in good faith, or without exposing the members to grave responsibilities, dispose of these rights at the prices mentioned in the ordinance, if other persons could be found, after reasonable notice or inquiry, who would pay more. The sum mentioned in the schedule should, I think, be regarded as a minimum; but there was no provision for a public sale or for competition; and the duty imposed upon the city officers was similar to that which attaches to any one clothed with authority to dispose of property at private sale not below a given price. But the precise directions of the ordinance—which apply to grants not within the section referred to, and to sales of real estate other than land under water—by which the price is to be determined, have no application to those grants of land under water at the place where the one in controversy is located. The averments, therefore, that no appraisalment was made

Roosevelt v. Draper.

according to the ordinances, that public notice was not given; and that there was no auction sale, are inapplicable, and have no tendency to show the grant to be illegal. They would have been material in connection with an averment of collusion between the officers who made the sale and the purchaser, and a conspiracy to defraud the city by passing the grant for an inadequate consideration; but there is no charge of want of good faith on the part of any person concerned. The statement that the property was of far greater value than the price given, and that some good judges estimated it to be worth \$300,000, unconnected with any charges of illegality or of fraud or collusion, does not raise any material issue. The only departure from the provisions of the ordinance, which I can discover, consists in the reservation of interest at the rate of only six per cent, when the ordinance expressly requires that seven per cent should be reserved upon all bonds and mortgages taken upon grants made by virtue of the ordinance. I have not heard any answer to this allegation of illegality.

I am of opinion that Mr. Draper, as a Governor of the Almshouse, was forbidden by the city charter to be concerned in such a purchase. The persons prohibited from being in any way interested in the purchase of any real estate or other property belonging to the corporation are the members of the Common Council, heads of departments, chiefs of bureaus and their deputies and clerks, and any "other officer of the said corporation." (Laws of 1849, p. 483, § 19.) The almshouse department is a branch of the city government, and Mr. Draper was one of its heads or chief officers (*id.*, § 17). If there could be any doubt as to this, he is certainly an officer of the corporation. There is, of course, a far stronger reason for prohibiting members of the Common Council and the Commissioners of the Sinking Fund from being interested in such sales, in which they would have a direct agency by virtue of their offices, than for attaching the disability to one filling the position held by the defendant Draper; but the legislature thought fit to extend it to all the corporation officers, including, of course, the Governors of the Almshouse, and we cannot

Roosevelt v. Draper.

make an exception. I do not, however, see that the plaintiff has any rights growing out of the violation of the statute in this respect. It is not charged that the grant was made for a less consideration because Mr. Draper was interested, or that the sinking fund has suffered any detriment on that account. It may well be that the city could maintain an action to impeach the conveyance, as being made contrary to law in this respect. But the plaintiff was not in any sense a party to the conveyance, and is not concerned to vindicate the law, unless it can be shown that his pecuniary interests have been injuriously affected. The averments fall short of stating such a case.

This brings me to the consideration of what I conceive to be a fatal defect in the plaintiff's case, putting it in the aspect of a suit by a creditor. He has no specific or general lien upon this property. He has, no doubt, an interest; and I think he has such a legal right to have the funds mentioned in the ordinance correctly administered, in order to subserve the purposes for which they were designed, as might be enforced by the courts, in a proper case. But the title of the city property, including that which was the subject of this grant, was in the corporation. The creditors have not even an equitable title. The duty of the city officers, entrusted by the sinking fund officers with its disposition and management, is a public governmental duty, and not a private one, for which they are generally responsible to the creditors; but if they do an act which produces injury to them, and which cannot be justified as the exercise of a discretion with which they are clothed, the individuals are, no doubt, responsible; and so, if an act is threatened, the direct and necessary tendency of which is to deprive the creditors of their security to an extent which will hazard the realization of their demands, the law, in my opinion, will
ventive remedy. But the complaint in this case
sent any such features. It assumes a right, so far
tiff's claims as a creditor are asserted, to question
the portions of the city property referred to in the
d ordinance, as though it was subject to an equita-

Durando v. Durando.

ble lien in their favor, whether their pecuniary interests are actually prejudiced or not. Such a view of their rights cannot be sustained.

I am in favor of affirming the judgment of the Supreme Court.

DAVIES, J., took no part in the case; JAMES, J., dissented from so much of the preceding opinion as holds Draper, a Governor of the Almshouse, to be within the statute prohibiting city officers from having an interest in the purchase of corporation lands: all the other judges concurring,

Judgment affirmed.

MARY DURANDO *v.* CHARLES P. DURANDO *et al.*

A widow is not dowable of land in which her husband has only a vested remainder, expectant upon an estate for life.

This rule holds as well where the estate of the husband comes by devise, as by inheritance.

The word "purchase," as used in Coke, Litt., 31, in reference to this point is limited to a purchase by deed.

APPEAL from the Supreme Court. Paul Durando died in 1847, leaving a widow, to whom he devised his real estate for life; remainder to his children, of whom Peter Durando, the husband of the appellant, was one. In 1855, during the lifetime of Paul Durando's widow, a portion of the real estate was appropriated for the extension of the Bowery in the city of New York, and its value was, by order of the court, deposited in the hands of the Chamberlain, the interest to be paid to the widow Durando during her life, and then to be subject to the further order of the court. Peter Durando died in 1853, leaving the appellant his widow. In April, 1860, immediately after the death of Paul Durando's widow, the appellant applied to the court by petition, claiming her husband's share in the money,

Durando v. Durando.

as his personal estate. The case was sent to a Referee to take proofs, &c., who reported that the petitioner was entitled to the money as personal estate of her deceased husband. Upon an appeal, the petitioner claimed, that if the fund was to be regarded as real estate, she was entitled to dower therein. The court, at general term in the first district, held that the petitioner had no rights in the fund as personal estate, nor any right of dower in the land out of which the fund arose. The petitioner appealed to this court, where the cause was submitted on printed arguments.

I. M. Buckingham, for the appellant.

David Thurston, for the respondents

SELDEN, J. To entitle a widow to dower, the husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during the coverture. This rule is inflexible. When, therefore, the husband had, previous to his death, simply a reversion in fee, or a vested remainder expectant upon an estate for life, his widow cannot be endowed. As in such a case the husband has never had either possession or any present right of possession, he cannot be said to have had a seizin of any sort, either actual or legal. It is conceded by the counsel for the appellant, that this rule applies where lands descend to the husband, subject to the right of dower of the widow of the ancestor; as if a father die intestate leaving a widow and a son, and the widow is endowed, it is not claimed that the widow of the son, in case of his death, in the lifetime of his father's widow, could ever be endowed of the lands which had been assigned for the dower of the latter. But it is insisted, that where the estate comes to the husband, not by inheritance but by purchase, the widow may be endowed, notwithstanding her husband has had only a remainder in the land.

The distinction, or rather the idea that it applies to this case, is evidently founded upon a misapprehension. It is true, that

Durando v. Durando.

where a father conveys lands to a son, subject to the contingent right of the wife of the father to dower, if the father dies, and his widow is endowed, and before her death the son dies leaving a widow, the latter, if she survive the widow of the father, is entitled to dower in the lands of which such widow had previously been endowed. But the reason is, not because there is any distinction between a vested remainder, which comes by descent, and one created by deed, but because in the case supposed, the son becomes actually seized of the estate in the lifetime of the father; and this seizin is sufficient to entitle his widow to dower, although his estate is contingent, and is defeated by the death of the father leaving a widow.

I can discover no other foundation for the position assumed by the appellant's counsel, than the inapt use by Coke of a single word in a passage which I will quote. In speaking on this subject he says: "For example, if there be grandfather, father and son, and the grandfather is seized of three acres of land in fee, and taketh wife and dieth, this land descendeth to the father who dieth either before or after entry, now is the wife of the father dowable. The father dieth, and the wife of the grandfather is endowed of one acre and dieth, the wife of the father shall be endowed only of the two acres residue, for the dower of the grandmother is paramount the title of the wife of the father, and the seizin of the father which descended to him (be it in law or actual) is defeated; and now upon the matter the father had but a reversion, expectant upon a freehold, and, in that case, *dos de dote peti non debet*; although the wife of the grandfather dieth leaving the father's wife. *And here note a diversity between a descent and a purchase.* For in the case aforesaid, if the grandfather had *enfeoffed* the father, or made a gift in tail unto him, then in the case above said, the wife of the father, after the decease of the grandfather's wife, should have endowed, of that part assigned to the grandmother; and the reason of this diversity is, for that the seizin, that descended after the decease of the grandfather to the father is avoided by the endowment of the grandmother, whose title was consummate by the death of the grandfather; but in

Durando v. Durando.

the case of the *purchase* or gift, that took effect in the life of the grandfather (before the title of dower of the grandmother was consummate), is not defeated, but only *quoad* the grandmother, and in that case there shall be *dos de dote*." (Coke, Litt., 31, a. b.)

The word purchase, which occurs in this paragraph, when used in contradistinction to descent, includes the obtaining of title by devise as well as by deed. But the whole reasoning of the passage quoted, shows that the effect attributed to a purchase follows only when the land is conveyed by deed. The sole reason given for the distinction is, that a purchase takes effect in the lifetime of the vendor, and the purchaser becomes at once seised of a defeasible estate; while in case of a descent, the heir is never seised of the lands assigned for dower during the life of the widow, as her title relates back in all cases to the death of the husband. Now, in this respect, there is not the slightest difference between a descent subject to dower, and a devise subject either to dower or any other life estate. In either case the freehold passes directly to the tenant of the life estate, upon the death of the ancestor or deviser, and neither the heir nor the devisee of the remainder can have any seisin until the death of such tenant.

The distinction is stated in terms perfectly accurate and precise by the Chancellor in the case of *Dunham v. Osborn* (1 Paige, 634); but in the subsequent case of *Cregier* (1 Barb. Ch., 598), he uses the word purchase as it is used by Lord Coke, and states the distinction as being between estates which came to the husband by descent, and those which came by purchase, subject to dower. This inaccuracy in the use of the word purchase, by both Lord Coke and Chancellor Walworth, is perfectly palpable; but as it has led to the bringing of so clear a case as the present to this court, it may be well to advert to and explain it. That it is this which has misled the counsel for the appellant is obvious, as he commences his citations in support of his doctrine with the Year Book (5 Edw. III, title, Voucher, 249), which appears to be the very authority upon which Lord Coke based his distinction. None of the other

Sweet v. Barney.

authorities cited by the counsel have any tendency to support his position; and it is very clear that it is untenable. The precise question was decided by the Supreme Court of Massachusetts in the case of *Eldridge v. Forrestal* (7 Mass., 253), and in *Beekman v. Hudson* (20 Wend., 53), it was assumed as perfectly clear, that in such a case the widow was not entitled to dower.

There can be no pretense that the widow is entitled to the fund in question as personal estate, under the statute of distributions. The money is the product of the land taken, and must belong to the persons entitled to the land which it represents, and out of which it arose. Besides, the title had already vested in the heirs when the proceedings for extending the street were commenced, and if the widow had then no right of dower in the premises, she of course can have no right to the money even if it is to be considered as personal estate.

The judgment of the Supreme Court must be affirmed.

All the judges concurring,

Judgment affirmed.

SWEET *et al.* v. BARNEY *et al.*

A common carrier of money from bankers in the interior to a bank in New York city, having no notice of the ownership, except what is implied from the address of the package, is authorized to treat the consignee as entitled to control the manner of its delivery.

Any delivery which discharges the carrier as between him and the consignee, is good as against the consignor.

Accordingly, where an express company entrusted with a package of money, addressed "People's Bank, 173 Canal street, New York," by the direction of the bank, delivered the package in a distant part of the city to its agent, from whom it was stolen, *held*, that the consignor to whom the package belonged, could not maintain an action for its non-delivery.

APPEAL from the Supreme Court. Action against the defendants, an Express Company, as common carriers, to recover

Sweet v. Barney.

the amount of a package of money, received by the defendants directed to the "People's Bank, 173 Canal street, New York." The defendants had a verdict at the circuit, which was affirmed at the general term of the Supreme Court in the seventh district, and the plaintiffs appealed to this court.

The proof showed these facts: The plaintiffs were bankers at Dansville, Livingston county. They kept an account with the People's Bank, in which they were in the habit of making deposits and drawing bills of exchange or checks against the same. A package containing \$2,892, was delivered by them to the defendants, directed "People's Bank, 173 Canal street, New York," to be forwarded as directed. The package was taken to New York, and delivered at the defendants' office in that city to one Messenger, an employee of the People's Bank. Messenger was a porter in the People's Bank, and had been for several years; was accustomed to receive money brought by the defendants' company at the bank, at the Clearing House and at the defendants' office. Messenger was also accustomed to act for the "People's Bank" in making exchanges and collections with other banks; and he acted as its representative at the Clearing House, at a desk labeled "People's Bank;" had there often received packages of money from the defendants addressed to "People's Bank" and given receipts for the same for said bank. The defendants' office was in the same building with the Clearing House, and Messenger requested the defendants to keep the packages for the "People's Bank" at their office until he called for them. The defendants did so, and Messenger regularly called for them and received them, and gave receipts. In the eighteen days previous to the delivery of this, nine other packages for the People's Bank were delivered to and receipted by Messenger without any complaint or objection from the bank. After the delivery to Messenger of the package in question it was stolen from him.

The plaintiffs' counsel requested the judge to charge the jury, that the duty of the defendants was to deliver the package at the bank as directed, and they were not authorized to deliver the same to any person at any place, other than at the bank.

Sweet v. Barney.

2. That neither the bank, nor the defendants were authorized to change the mode of delivery of the package without the consent or knowledge of the plaintiffs; and that such change, if made without their knowledge or consent, would not discharge the defendants.

The judge refused both of these requests, and the plaintiffs' counsel excepted to such refusal. The judge charged that a delivery to an agent of the bank, authorized by it to receive the package, at any place other than the bank, would discharge the defendants, to which the plaintiffs' counsel also excepted.

Waldo Hutchins, for the appellants.

Charles O'Connor, for the respondents.

JAMES, J. That these defendants were common carriers can hardly be doubted. Persons whose business it is to receive packages of bullion, coin, bank notes, commercial paper, and such other articles of value as parties see fit to trust to their care for the purpose of transporting the same from one place to another for a compensation, are common carriers, and responsible as such for the safe delivery of property intrusted to them. (*Russell v. Livingston*, 19 Barb., 346; *Sherman v. Wells*, 28 Barb., 403.) Such was the business of these defendants, and such their responsibility.

The consignee is the presumptive owner of the thing consigned; and when the carrier is not advised that any different relation exists, he is bound so to treat the consignee; but this presumption may be rebutted; and if in an action for non-delivery by the consignor against the carrier, that presumption be overcome, the action is properly brought in the consignor's name. (*Price v. Powell*, 8 Comst., 822.) But in this case, unless a delivery of the money be established, the plaintiffs' right to recover was made out.

There was no notice that the contents of the package in question belonged to the consignors; nor was there any fact proved, calculated to weaken the presumption of ownership in

Sweet v. Barney.

the consignee. The defendants were, therefore, not only authorized but fully justified in treating the consignment as the property of the bank. The defendants could not know that they were employed to make a deposit in the "People's Bank" for the benefit of the assignors; or that this package was entitled to or demanded a special delivery. There was in fact, nothing in the transaction to advise them that this package was to be treated differently from other packages actually belonging to the bank; and, therefore, any delivery good against the bank, discharged the carrier.

The principal question, then is, was there a delivery good against the bank; if there was, the plaintiffs must follow the bank; they have no cause of action against these defendants. It is conceded that the liability of a carrier begins with the receipt of the goods by him, and continues until the delivery of the goods by him, subject to the general exceptions. And an express carrier is bound to deliver the goods at their destined place, to the consignee, or as the consignee may direct. In general, the delivery must be to the owner or consignee himself, or to his agent (11 Met., 509), or they must be carried to his residence, or they may be taken to his place of business, when from the nature of the parcels that is the appropriate place for their delivery. But there is no rule of law requiring a delivery at the consignee's residence or place of business, when he is willing to accept it at a different place, or directs a delivery at another place. The consignee, or his authorized agent, may receive goods addressed to him in the hands of a carrier at any place, either before or after their arrival at their place of destination, and such acceptance operates as a discharge of the carrier from his liability. It was held in *Lewis v. The Western Railroad* (11 Met., 509), that if A, for whom goods are transported, authorizes B to receive a delivery thereof, and to do all acts incident to the delivery and transportation thereof to A, and B instead of receiving the goods at the usual place of delivery, requests the agent of the railroad to permit the car which contains the goods to be hauled to a near depot of another company, and such agent

assents thereto, and assists B in hauling the car to such depot, and B then requests and obtains leave of that company to use its machinery to remove the goods from the car—the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and cannot be charged with any loss that may happen in the course of such delivery to A.”

Had the consignee in this case received the package in question at the defendants’ office, I think no one would doubt the defendants were discharged. The case then turns upon Messenger’s agency. If an authorized agent in the premises, a delivery to him was as effectual as a delivery to the principal. The question of agency was a question of fact, and was settled by the verdict of the jury.

We think the delivery at the office of the defendants’ to the authorized agent of the consignee was proper, and operated to discharge the defendants from their obligations as carriers.

This disposes of the case unless there was some error committed at circuit in submitting the question of Messenger’s authority to the jury, or in the courts refusing to charge as requested. I have been unable to discover any such error. The evidence submitted was competent—it was of the most perfect and satisfactory kind, and not only justified but required the verdict rendered. The judgment should be affirmed.

All the judges concurred, except DAVIES, J., who upon a previous argument of the cause (this being the third) delivered the following opinion:

DAVIES, J. (Dissenting.) The plaintiffs in 1854 were dealers with the People’s Bank of the city of New York, and were accustomed to make deposits therein, which in the usual course of banking business were passed to their credit, and upon or against which they drew drafts or checks. Being at a distance from the bank, and consequently unable either personally or by a clerk to make a deposit in the bank in the usual way,

Sweet v. Barney.

they employed the defendants for that purpose, and they undertook and agreed to perform that service. There is nothing unusual or extraordinary in this. It is a thing of not unfrequent occurrence, where the dealer with a bank, residing in the same or adjoining or proximate places, with the location of a bank, employs agents or carriers to make deposits for him. The employment is lawful, and in this case the agreement is clear and specified.

The question presented for our consideration in this case is, whether the defendants have performed the service which they undertook. There is no ground for the assumption, that the money transmitted by the defendants was the property of the bank. It was sent by the plaintiffs to be deposited with the bank as their property, and there is no reason to infer that it was sent to pay an antecedent debt. There is no proof that any such debt existed, and it might as well be said that the money of any depositor when set aside to be deposited in a bank became the property of the bank and ceased to be that of the depositor. It is placed in the bank for safety, and as a convenient mode of transacting business and for making payments by the depositor, by checks or drafts on the bank. It could be attached and reached as the property of the depositor. The ordinary presumptions applicable to a consignment of property, as to the ownership by the consignee, have no application to the present case. Have the defendants performed the service which they undertook? It is contended on their behalf that they have, because they delivered the package to an agent of the bank, and, as they assume, under such circumstances as would render the bank liable to the plaintiffs for the money transmitted.

It would seem to be a sufficient answer to this defence to say, that such was not the contract made by the defendants with the plaintiffs, and that they have no legal right to make a new contract, or do something which they contend is equivalent to that undertaken to be done by them: There is no pretence that the plaintiffs were parties to any such modification of the contract, made or had any knowledge of it, or in any

Sweet v. Barney.

manner assented to it. Nor can it be alleged that the custom of the defendants in delivering packages to the parties, at places other than the bank, can have any effect on the rights of the plaintiffs. As between the defendants and the bank it has significance: as to the parties to the contract, it is *res inter alios acta*, and the plaintiffs are not deprived of any of their rights by reason of it. It is well settled, that it is the duty of the carrier, not only to transport the goods safely to the place of delivery, but without any demand upon him to deliver the same according to the owner's direction. There is no question that in this case the directions of the owners, the plaintiffs, were to deliver this money at the bank, at 173 Canal street, to the officers of the bank. It was held in *Hyde v. Trent and Jersey Navigation Company*, (5 T. R., 389) that a delivery to a porter at an inn, to carry to the consignee, did not discharge the carrier. That the goods continued at the risk of the carrier until a personal delivery at the house or place of deposit of the consignee, and that the porter to whom the package was delivered, was the servant of the carrier. It would follow in the present case that Messenger, the porter to whom the defendants delivered the package in this instance, is to be regarded as the servant of the defendants. *Prima facie*, the carrier is under an obligation to deliver the goods to the consignee personally at the place of delivery. Custom of so general and universal a character as may warrant the supposition that the parties contracted with reference to it, may be proven to vary the manner of the delivery; or the place and manner of the delivery may be varied by the assent of the owner of the property; and where he interferes to control or direct in the matter, he assumes the responsibility. (Edwards on Bail., pp. 515, 519.) In this case no general or universal custom changing the carrier's legal liability, of such a character as that we may presume the parties to have contracted in reference to it, was shown or pretended. Neither was it alleged that the owners, the plaintiffs, had by their assent in any manner varied the carrier's legal liability, or interfered in any way with the delivery or had any knowledge of the practice of the defendants in

Sweet v. Barney.

making deliveries different from that contained in the direction or contract, or had given any consent to any other delivery or to any change of the legal liabilities assumed by the carrier on receipt of the package. The arrangement alleged to be made between the defendants and the bank or its officers, by which a different delivery was made than that embraced in the contract with the plaintiffs, can therefore have no binding effect upon the plaintiffs, or in any manner impair or affect their rights.

It is no answer to the claim of the plaintiffs, for the defendants to say that they have made such a delivery to the bank, as will legally compel it to respond to the plaintiffs for the amount of this money. It is sufficient for the plaintiffs to reply that they are not bound to litigate that question. That is a matter between the defendants and the bank. The plaintiffs employed the defendants to do a certain thing, to make the deposit for them in the bank; this they undertook to do for reasonable hire paid to them. They have not done it, and the plaintiffs had a right to have the deposit made as agreed upon, and in consequence of the defendants' default in not making it, to recover from them the amount so entrusted to them for this purpose. If they have any claim upon others, it is for them to enforce it and not the plaintiffs.

The learned judge at the circuit therefore erred in refusing to charge the jury as requested by the counsel for the plaintiffs, and in charging that if a delivery was made so as to render the bank liable for the money of the plaintiffs, it was such a delivery as was called for by the contract.

Judgment affirmed.

Sanford v. Eighth Avenue Railroad Company.

SANFORD, Administrator, &c., v. THE EIGHTH AVENUE RAILROAD COMPANY.

To eject a passenger from a railroad car, while in motion, is so dangerous an act that it may justify the same resistance on the part of the passenger as to a direct attempt to take his life.

Where the passenger is liable to ejection in a proper manner, for refusing to pay fare, his resistance to the attempt to expel him without stopping the car, does not present a case of concurrent negligence on his part.

Where, in such a case, the principal is responsible for the act of his agent, he is, it seems, also responsible for any circumstances of aggravation which attended the wrong.

Where after a trial by jury a new trial is granted by the court below, this court having no power to review a question of fact, will affirm the order, if it can be maintained upon any view to be taken of the evidence.

APPEAL from the Superior Court of the city of New York. Action, under the statute, for damages to the next of kin of the plaintiff's intestate, resulting from his death by the wrongful act of the defendant's agent. On the trial these facts appeared: On the evening of December 30, 1855, the deceased entered one of the defendant's cars in a street of New York city. Upon being called upon to pay his fare, he refused because upon the previous evening he had paid fare and had not been carried (the track being obstructed by snow), nor had the fare been refunded. The conductor told him that he must pay or leave the car, and without stopping the car, led him to the forward platform and forcibly ejected him therefrom. There was some conflict of evidence as to the extent of the deceased's resistance. It was dark and cold. There was an embankment of frozen snow and ice on each side of the track. As the deceased fell from the car he struck upon this embankment, rolled or slid down between it and the projecting part of the car, and was so crushed and jammed between the embankment and the car as it proceeded on its course, that he died in a few days afterwards at the hospital, to which he was conveyed.

Sanford v. The Eighth Avenue Railroad Company.

The judge charged the jury, in substance, that when the deceased refused to pay the fare he was in fault and the conductor had a right to remove him. He left it to the jury to determine whether the conductor put the deceased out of the car in a negligent and imprudent manner, "so that by the negligent and imprudent manner in which Mr. Sanford was ejected, he received the injuries of which he died without himself being guilty of negligent or imprudent conduct at the time he was actually put off, which contributed to produce the injury."

The plaintiff had a verdict. Upon appeal the court at general term set aside the verdict, and ordered a new trial. The plaintiff appealed to this court.

H. B. Cowles, for the appellant.

Aaron J. Vanderpoel, for the respondent.

COMSTOCK, Ch. J. Where the trial is by jury, we have no power under the existing rules of law to review any question of fact determined in the subordinate courts. In this case, therefore, we should be obliged to affirm the order granting a new trial, if that order could stand consistently with any view to be taken of the evidence given at the trial. But we are of opinion that after giving to the defendant the benefit of whatever conflict there may be in the testimony, and after examining the facts proved in the light most favorable to him, the plaintiff was entitled to a verdict.

It is said, and such is the proof by one of the witnesses, that the intestate, on stepping upon the platform of the defendants' car, announced his intention not to pay the fare, alleging that he had paid it on the previous day without having been carried so far as he was entitled to go. On this ground it is claimed that the relation of carrier and passenger never arose between the parties. But there is in this proposition nothing which requires a serious consideration. If the fact be as stated, the intestate might have been refused admission to a seat in the

Sanford v. The Eighth Avenue Railroad Company.

car. But he was allowed to pass in and sit down like other passengers, and the fare was afterwards demanded of him in the usual way. This conceded his right to take a seat, and his situation was that of any person who enters one of these cars and sits down as a passenger. Undoubtedly it was his duty to pay the fare when demanded, but nothing anterior to his refusal so to do has anything to do with the present question.

In the next place, it must be conceded that the conductor had a right to expel the intestate for the reason that he would not pay his fare when asked to do so. But this was not a right to be exercised in a manner regardless of all circumstances. A person cannot be thrown from a railroad train, in rapid motion, without the most imminent danger to life; and although he may be justly liable to expulsion, he may lawfully resist an attempt to expel him in such a case. As the refusal of a passenger to pay fare will not justify a homicide, so it fails to justify any act which in itself puts human life in peril; and the passenger has the same right to repel an attempt to eject him when such an attempt will thus endanger him, that he has to resist a direct attempt to take his life. The great law of self-preservation so plainly establishes this conclusion, that no further argument can be necessary.

In this case all the evidence shows that the conductor of the defendants' car, without arresting its motion, seized the plaintiff's intestate and forcibly ejected him. The danger attending such an act was enhanced by other circumstances. It was in the night, and a high bank of snow was thrown upon each side of the track. No injury might have resulted if the expulsion had taken place from the rear, instead of the front of the car. As a direct consequence of the conductor's act the passenger was injured so that he died; and the act itself, under the circumstances stated, being necessarily attended with great danger, stands without a legal justification. It is said that the intestate offered resistance when he was thus seized. But this he had a right to do in order to save his life, which he had not forfeited by refusing to pay the fare. He was liable, as we

Sanford v. The Eighth Avenue Railroad Company.

said, to be expelled, and the conductor's assault would have been justified if the car had been stopped, and the expulsion had been made without unnecessary violence. But as the conductor had no right to make the assault, when he did and as he did, so the law will justify such resistance as was offered to that assault.

The decision of the court below appears to have proceeded upon a rule of law, which we think is inapplicable to the case. In the opinion of that court, it is conceded that the conductor was guilty of negligence and improper conduct in expelling the passenger without stopping the car. But the latter was also in the wrong in occupying a seat without paying the fare, and the case was put as one of concurring negligence where the injured party is without redress, because he is himself in fault. We fail to see how this principle can be invoked. It cannot be applied to an intentional trespass, certainly not to a case like the present. If the plaintiff's intestate had not died of his injuries, his action for the wrong would have been strictly and technically assault and battery. In such an action a plea that the plaintiff was guilty of concurring negligence or fault would have been without precedent, as well as illogical and absurd. To such a cause of suit, the defendant must find and plead a complete justification of his conduct, or he must fail and pay the damages. At the common law the cause of action was lost if the injured person died, but under the statute it survives to the administrator, and is governed in this respect at least by the same rules of law. The case is, therefore, to be stated thus: The defendants by their servant were guilty of a personal and intentional assault upon the intestate. That assault, as we think, was not in law justified by the facts, and they are consequently without a legal defence.

Entertaining as we do this view of the case, it becomes unnecessary to examine in detail the charge of the judge at the trial. It was quite as favorable to the defendants in all respects as the law of the case would justify. A single point may be noticed: The judge was desired to charge that if the conductor in the execution of the defendants' directions to remove

Chautauqua County Bank v. White.

any one from the cars who declined to pay fare, used unnecessary force and wantonly injured the deceased, the defendants are not liable for such excess. This instruction was refused. The request of course assumed that the conductor's assault was justified by his instructions and by the circumstances; by his instructions so as to render his principals liable if he would be, and by the circumstances so as to exonerate them both. This being assumed, the point of the request was that he alone, and not his principals, was liable for any excess of force and violence. This may have been good law in the abstract. But it fails of application to the case, because the assault itself, as we have seen, was unjustifiable; and the defendants being liable for that as principals (which the proposition did not deny), they are also answerable for any circumstances of aggravation which attended the wrong. It may be added, that the case does not disclose any special facts of this kind. The wrong consisted in ejecting the intestate from the car without a justification of that act.

The order granting a new trial must be reversed, and the judgment for the plaintiff on the verdict must be affirmed.

All the judges concurring,

Judgment affirmed.

CHAUTAUQUA COUNTY BANK v. WHITE, Survivor, &c.

A new trial in ejectment is obtainable, as of course, under 2 Revised Statutes, 309, section 37, only within three years after the first judgment in the action, and not within three years after the affirmance of that judgment in the court of last resort.

The order making the judgment of this court the judgment of the court to which it sends its remittitur, is an order of course, and the omission to enter it is a formal irregularity which the court below may amend, and which on appeal from subsequent orders will be disregarded in this court.

23	347
126	340

Chautauqua County Bank v. White.

It seems, however, to be the better practice to make a formal motion in the court below, on filing the remittitur.

APPEAL from several orders of the Supreme Court. The nature of such of them as are of any interest, and the facts relating thereto, are sufficiently stated in the following opinion.

William D. White, appellant, in person

Chauncey Tucker, for the respondent.

DAVIES, J. This is an action of ejectment, and was tried at the Chautauqua Circuit before Mr. Justice MARVIN on the 8th of December, 1848, and a verdict was rendered by the jury in favor of the plaintiffs. On this verdict a judgment was entered in favor of the plaintiffs on the 18th of August, 1852, and the costs adjusted at \$36. On the 13th of September, 1852, the defendants appealed from this judgment upon exceptions taken by them. The appeal was heard at the general term of the seventh district on the first Monday of September, 1856, and the judgment appealed from was affirmed. From this order the defendant, White, appealed to this court; and at the September term of this court, in 1858, the said judgment was affirmed. On the hearing of the motion now under review at the special term, the defendant White, claimed, as matter of right, a new trial in the action, on payment of costs. His offer to this effect, as appears from the papers, was first made in the defendant's affidavit, sworn to on the 22d of February, 1859. The provision of the statute is, that the court in which such judgment (that is, every judgment in the action of ejectment rendered upon a verdict, as mentioned in the preceding section) shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, and upon payment of all costs recovered thereby, shall vacate such judgment and grant a new trial in such cause. (3 R. S., § 30, p. 596.) It has been held that this section applies to actions under the Code, but it is essential to the relief that

Chautauque County Bank v. White.

there should have been a trial by jury and a verdict rendered, upon which the judgment was entered. (*Holmes v. Davis*, 21 Barb., 265; *Lany v. Ropke*, 1 Duer, 701.) It is incontrovertible that by the provision of this section, the application for the new trial, and offer to pay the costs, must be made within three years after the judgment is rendered upon the verdict. The court in which the action is pending can only grant the relief contemplated by this section, when the application is made within that time. The judgment of the Supreme Court was rendered on the defendant's application upon the verdict on the 18th of August, 1852, and after three years from that date that court had no power to grant the new trial on the defendant's application, and on payment of costs by him. The defendant is mistaken in supposing that this section means the final judgment rendered by the court of last resort. It is the first judgment in the action rendered upon the verdict of the jury, which is the one referred to in the provision. At the expiration of three years from that date, the rights secured to a defendant in ejectment, by this section, are gone. The court below correctly decided, therefore, that it had no power to grant the new trial on the defendant's application.

I have had some embarrassment in reference to the remaining question made by the appellant, viz., that the execution and writ of possession issued on the last judgment were irregular, as the judgment of this court had not been made the judgment of the Supreme Court. It appears that the remittitur from this court was filed with the clerk of the county of Chautauqua on the 20th of November, 1858, but that no order was then, or has been since, entered with said clerk, making the judgment of this court the judgment of the Supreme Court. The costs on the appeal were noticed for taxation, at the time the remittitur was filed with the clerk, before him; but by an arrangement between the attorneys the adjustment was adjourned until the 26th of November, to enable the plaintiff's attorney to consult one of the justices of the Supreme Court in reference to the remittitur and the costs. The same were handed to Justice GREENE on the 22d of November, but it does not

Horner v. Wood.

appear that he made any order thereon; and on the 26th of November, when the costs were finally adjusted, the remittitur was returned to the files of the clerk of the county of Chautauqua. It undoubtedly is the better practice to file a remittitur from this court in the court from whence the case comes to this court, and make a motion therein, and have an order entered that the judgment of this court should stand and be the judgment of that court. The omission to enter such an order is a formal irregularity, which the court can at any time correct by directing the order to be entered *nunc pro tunc*. It is an order of course, and we may assume that the Supreme Court in denying the motion to set aside the execution and writ of possession did not deem the omission of any serious moment. If the order has not been entered, it is competent for the Supreme Court to direct it to be done, as of the day the remittitur was filed; and we do not think the omission presents sufficient ground to reverse the orders made in the court below.

The orders appealed from are therefore affirmed, with costs.

All the judges concurring,

Orders affirmed.

HORNER *et al.* v. WOOD *et al.*

The statute concerning the labor of convicts in state prisons (ch. 460 of 1847, § 77) does not require the contract for their employment to state the precise number. It is sufficient to fix the maximum and minimum, as from fifty to one hundred.

A provision in such contract, giving the right to enlarge the time of its continuance from three to five years is, it seems, valid. If otherwise, it is void only as to the additional years, but valid as to the three.

Such a contract is assignable. The position of a contractor for convict labor is not one of public confidence or duty.

APPEAL from a judgment of the Supreme Court, rendered in favor of the plaintiffs upon a demurrer to the complaint.

Horner v. Wood.

The action was brought on a covenant, dated April 15, 1851, for the payment by the defendants to the plaintiffs of \$1,000. The instrument was set forth in *hæc verba*, in a schedule annexed to the complaint. It recited that the plaintiffs had entered into a contract with the agent of the state prison at Sing Sing, "for the services of from fifty to one hundred convicts, to be employed in the business of making files and saws in said prison, for three years from the 1st day of May, 1851, with the privilege of extending the same for five years from the date of the contract." The plaintiffs, by said instrument, assign this contract to the defendants, with "all benefit and advantage to be derived from the same;" and they agree, moreover, to furnish the defendants for one year, with steam power from their (the plaintiffs') engine in said prison, sufficient to run six grindstones, &c., and with shop-room for the grindstones. The defendants covenant to pay the plaintiffs in consideration of the assignment, \$1,000 a year, on the 1st day of November in each year, during the continuance of the contract, and \$100 a month during one year for the use of the steam power, and to reimburse the plaintiffs for their expenditures in commencing the saw-making business in the prison, and to indemnify them against obligations incurred therein, the defendants being entitled to the tools, &c., provided by the plaintiffs; and the defendants further covenant to perform the agreements with the agent of the prison, contained in the plaintiffs' contract for the convicts' labor. The assignment was to be void and the interest to revert to the plaintiffs, if the defendants should be in default in their payments for thirty days. The complaint avers general performance on the part of the plaintiffs, that the defendants have had the benefit of the contract, including the convict labor mentioned in it, down to the time of the commencement of the action, but that they had made default in the payment of \$1,000 which they ought to have paid, according to the agreement, the 1st day of November, 1852.

Horner v. Wood.

The Supreme Court overruled the demurrer, and gave judgment for the plaintiffs for the \$1,000 claimed, and the interest; and the defendants appealed.

Daniel E. Sickles, for the appellants.

Edward Wells, for the respondents

DENIO, J. None of the exceptions which the defendants take to the complaint appear to me to be well founded.

1. It is argued that the contract, the assignment of which is the consideration of the defendants' covenant, is void on its face for want of conformity to certain express provisions of the statute respecting the letting of such contracts. The contract, as referred to in a general way in the agreement between the present parties, is said to be for the services of from fifty to one hundred convicts. It is insisted that, to be valid, it should be for a precise number. Then the period during which the contractors were to be entitled to the labor of the convicts was three years, with the privilege of extending the same to five years; and this is said to be illegal, the statute, as it is argued, requiring such contracts to be for a definite and certain time. As the contract with the agent is not set out, and its contents are only referred to briefly for the purpose of identification, we do not know upon what circumstance it was to depend, whether the number of convicts employed should be fifty or one hundred and fifty, nor with certainty at whose option it was that the time should be enlarged to five years; though as to the last it seems probable that the employer of the convicts was to have the right to determine that point. As the defendants, who have the *onus* of showing the contract to be void, have not given us its language, if, upon any reasonable assumption as to the bearing of those portions of it which are not given, it would be consistent with law, we are not to declare it void for a supposed want of conformity to it. The number of convicts of all kinds, and of course the number of those suitable to be employed in making saws and files must necessarily

fluctuate considerably, though probably a tolerably approximate estimate could generally be made. It would therefore be quite reasonable to suppose that the agent would be safe in binding himself to furnish to the contractor a certain limited number, less than the whole number which he would probably have, and to agree to furnish, within prescribed limits, so many more as there might be on hand. Then, as to the duration of the contract, parties might be willing to embark in a given business, to be carried on in the prison for a certain number of years, and might desire the privilege of enlarging the period, if the business should be found advantageous. *Prima facie*, there would be nothing illegal or wrong in contracts containing such provisions; and it remains to inquire whether they are prohibited by statute. The provision on which the defendants rely is contained in the 9th section of the act in relation to the state prisons, passed in 1835 (ch. 302), and in the statute of 1847 (p. 615, § 77). It declares that notice by advertisement shall be given of the time and place of letting every contract for the labor of convicts, which notice, it is said, "shall specify the particular branch of business in which the convicts are to be employed, *the length of time for which their services are to be let, not exceeding five years, and the number of convicts to which the contracts are to be limited*; and in all those branches of business of which the consumption of the country is chiefly supplied without foreign importation, the number of convicts to be employed or let shall be limited by the number of convicts who had learned a trade before coming to prison." There is no averment that there was any defect in the notice, but the argument is that the direction as to its terms indicates what particulars are required to enter into the contracts, so far as the subjects of time and of number are concerned. The object of the notice is to secure competition among parties desirous of contracting, in order to enable the State to obtain a fair price, and to prevent favoritism. To enable bidders to make their proposals, it is essential that the substance of the contract should be made known, and one of the most material of the terms which are to enter into it doubtless is the number

Horner v. Wood.

of the hands to be employed. An advertisement that the agent would let the services of fifty convicts certain, and as many more within a definite limit as there should be in the prison, suitable to be employed at the particular business, would be sufficiently definite for the purposes referred to; and it would in my judgment comply with the terms of the statute. That does not prescribe that the number to be ultimately embraced in the contract should be exactly stated in the advertisement, it only requires a statement of the number of convicts to which the contracts are to be limited. That language seems to be used in contemplation of the peculiarity of the circumstances regulating the supply. It prescribes that the maximum and perhaps the minimum should be named. There is no reason to doubt, and certainly no authority to deny, that the limits in both respects were stated in the advertisements in the same manner as in the contract. I think this was the proper way to transact the business and that it did not violate any law.

This contract bound both parties to a definite period of time for the service of the convicts, namely three, years; and this satisfied the terms of the statute, if we shall construe it as requiring that the period of employment should be stated in the agreement. There was a privilege given to the contractors to enlarge this time. Doubtless they were to signify their determination in some way to the agent. We cannot assume, for the purpose of sustaining the demurrer, that the advertisement concealed or failed to state that this provision, as to the enlargement of the time, was to be one of the terms of the contract. Supposing adequate notice to have been given to the bidders, the insertion of such a provision in the proposals would not interfere with the opportunities for competition. I am unable therefore to see that there was anything unlawful in that part of the contract which was contingent upon the contractors electing to enlarge the period to five years. This did not exceed the time which the policy of the legislature had prescribed for the extreme duration of such contracts. But if the contract was void for all beyond three years, it was valid to that extent. The provision, looking to the additional

Horner v. Wood.

period, was simply void as being in excess of the authority of the agent, but it did not vitiate the sound part of the contract.

2. The defendants maintain that the contract was not in its nature assignable. Hence, their counsel argue that no interest passed by the assignment to the defendants, and that, consequently, their covenant to pay an equivalent for such assignment is shown to be a *nudum pactum*, which is not now obligatory though under seal. This argument is based upon the assumption that the contractor was clothed with a fiduciary or a *quasi* official character, which was conferred upon him from motives relating to his personal fitness; in other words that by receiving the contract he was entrusted with a participation in the discipline of the prison. If this were so, the consequence would probably follow that the trust would not be assignable. But an examination of the statute will show that the position is based upon a misconception of its meaning. There is no power conferred upon a contractor or his foreman or servants to interfere in any way in the discipline of the prison; nor is there any requirement obliging the person contracting for the labor of convicts, to attend personally at the prison or to have any individual agency in the superintending the performance of the labor. Doubtless he must have persons acting on his behalf to take a supervision of the work, and to perform the duties in that respect usually entrusted to a foreman in any other workshop. But the statute clearly contemplates that the convicts, while laboring under contracts, as well as at all other times, shall be under the charge of a keeper or keepers (Laws of 1847, p. 610, § 58); and the discipline is at all times under the general supervision of the warden (*id.*, p. 607, § 53). It is no doubt the right and the duty of the immediate officers of the prison to see that the persons admitted into the shops, on behalf of contractors, shall conduct themselves suitably and interpose no impediments to the maintenance of order and obedience on the part of the convicts; and they may expel and prohibit the return of any one who shall offend in these particulars. The contracts are to be let, as has been mentioned, after notice given by advertisement; and

Horne v. Wood.

there is no provision which suggests that there is to be any scrutiny exercised as to the character, habits, understanding or temper of parties proposing to contract. Should a person to whom a contract was awarded be personally unfit for the duty of superintending the labor of the convicts, he could be excluded as readily as a person employed by him; and he would then be obliged to engage a suitable person to superintend the work. The discipline of the prison cannot be subordinated to the convenience of the contractor. These considerations have led me to the confident opinion that the position of a contractor for convict labor is not one of public confidence or duty, and that the contractors are not designated upon any considerations of personal fitness for the management of prisoners. The agent I am satisfied is to award the contracts to the parties who will pay the highest price for the labor, and at the same time give adequate security for the performance of their part of the agreement. I know of no principle forbidding the transfer of the equitable interest in a contract of that character. The original parties remain of course responsible to the agent or to the State, notwithstanding the assignment, but the profit and advantage of the contract belongs to the assignees, they performing, as they have agreed to do, the engagement towards the State which the original contractors took upon themselves.

I think the demurrer was properly overruled, and that the judgment should be affirmed.

All the judges concurring,

Judgment affirmed.

The New York Ice Company v. North Western Insurance Company.

THE NEW YORK ICE COMPANY v. THE NORTH WESTERN
INSURANCE COMPANY OF OSWEGO.

23	357
121	551
23	357
144	180

No appeal lies to this court from an order of the Supreme Court at general term reversing an order at special term, by which a judgment dismissing the complaint without prejudice to the plaintiff's right to bring a new action, was so amended as to permit him to file an amended complaint in the original action.

It seems, that such an order is a matter of discretion, from which no appeal lies to the Supreme Court at general term.

Where the complaint was framed in a double aspect, praying damages upon the breach of a written contract, and also a reformation of the contract if necessary, upon the allegation of mistake, the court should retain the action and give such relief as the plaintiff, independent of any reformation of the contract may entitle himself to, although he may, upon a trial, fail to show himself entitled to equitable relief in the reforming of the contract.

So long as a judgment is subject to appeal, and perhaps afterwards, it is, it seems, subject to such correction and modifications, as the court, by which it was pronounced, may see fit to make.

APPEAL from the Supreme Court. The action was brought on a policy of insurance against loss by fire. The complaint averred a claim on the policy for the loss, and it also averred facts from which it was claimed that an error had occurred in making out the policy. It demanded judgment for the amount of the loss; and, in case it should be necessary to the recovery that the policy should be reformed and corrected, for a further judgment as might be necessary. The case was brought to trial, at special term, before Mr. Justice INGRAHAM without jury, as an equity case. He was of opinion that the mistake, if any, was not in the written instrument, but in a misunderstanding of the parties, by which there was a want of concurrence of minds upon the conditions of the contract; and this he held did not present a case for relief. The plaintiff then asked to have a further trial as to their right to recover upon the policy of insurance, as it actually stood without reformation. The judge held this inadmissible, on the ground that he had

The New York Ice Company v. North Western Insurance Company.

no authority to try the right of the plaintiff under the policy, without a jury, nor to send the case to a jury for a second trial. He conceded that had the right to equitable relief been established, it would have been his duty to have proceeded and done complete justice; but regarding the action as purely an equitable one, held that a claim for mere legal relief could not be united. He therefore dismissed the complaint without prejudice to the right of the plaintiff to bring a new action upon the policy. The plaintiff having discovered that the time for bringing an action was limited by the terms of the policy and had expired, made an application at special term, and the judgment was so amended as to permit him to "serve a new complaint at law." On appeal, the order allowing this amendment was reversed, at general term in the first district, on the ground that the authority of the court to amend a judgment (without a rehearing of the case) extended only to mistakes or omission, and did not reach a case where the judgment was precisely what it was intended to be, and disposed of the whole case. The plaintiff appealed to this court, and the defendant moved to dismiss the appeal.

William Curtis Noyes, for the motion.

Mr. Sherman, opposed.

COMSTOCK, Ch. J. The object of the suit was to recover the sum of \$4,000, in which the defendants, by a fire policy, insured the plaintiffs. In the complaint it was stated that a certain clause in the policy descriptive of the subject of insurance was inserted by mistake, and that the defendants taking advantage of that clause had refused to pay the loss. The prayer of the complaint was for the recovery of the \$4,000; and, if necessary, that the contract be reformed by striking out the clause in question. The case was tried before Mr. Justice INGRAHAM, who dismissed the complaint. The decision proceeded solely on the ground that the plaintiffs had not made out a right to have the contract reformed; but no determination was made that the plaintiffs

The New York Ice Company v. North Western Insurance Company.

were not entitled to recover on the policy as it actually was. The learned Justice was of the opinion that such a recovery could not be had without instituting a new suit, and the judgment was accordingly without prejudice to the right of bringing another action. But the plaintiffs afterwards ascertained that, by a provision in the policy, actions must be brought within twelve months after a loss, and that it was too late to begin *de novo*. They then moved the special term to amend the order of dismissal, by inserting leave to file a complaint "at law" in the same action, and an order granting such leave was made. From this order the defendants appealed to the general term, where the same was reversed, and from the order of reversal the plaintiffs appealed to this court. The defendants move to dismiss this appeal.

I confess myself unable to see why the plaintiffs were not entitled to a reformation of the contract. The learned justice who tried the case, in the opinion given by him, after referring to the evidence, observes: "The only conclusion I can adopt on this evidence is that there was a mutual mistake as to the description of the premises arising from a misunderstanding of the parties in the original negotiation of the contract, and that the defendants' agent in making the policy made it as he intended it should be when he agreed to insure the property. The policy was made according to his description entered by him in the books of the company," &c. Now if the misdescription of the subject of insurance was material, and was entered in the books of the company, and found its way into the policy in consequence of a mutual mistake or misunderstanding of the parties, it seems to me that a proper case was made out for a reformation of the contract.

In the next place, I am of opinion that it was erroneous to turn the plaintiff out of court on the mere ground that he had not entitled himself to the equitable relief demanded, if there was enough left of his case to entitle him to recover the sum in which he was insured. No suggestion was made that the complaint did not show a good cause of action for this money, even after striking out all the allegations and the prayer on

The New York Ice Company v. North Western Insurance Company.

the subject of equitable relief. But because it contained those allegations, and because those were tried without a jury and tried unsuccessfully, the court refused to entertain the case for the relief to which the plaintiff was in fact entitled, that is to say, for the recovery of the money without reforming the contract. This ruling proceeded wholly on the authority of the case of *Reubens v. Joel* in this court (3 Kern., 488), which it is intimated was a departure from previous cases also in this court. But this is a mistake. In that case a debtor had made, as it was alleged, a fraudulent assignment of his property; and a creditor, by simple contract, commenced a suit against the assignor and assignee praying a recovery of his debt, and for an injunction to restrain the alienation of the property assigned. The question in the case arose on demurrer, put in by the assignee, and the point determined in this court was, that such a creditor was not entitled in such a case to equitable relief by injunction. We all thought that the creditor had no standing in court, legal or equitable, as against the assignee, until after judgment against his debtor, and whatever was said beyond this is to be taken as individual opinion merely. The doctrine of the previous cases (2 Kern., 266; *id.*, 336), favorable to uniting in the same action legal and equitable grounds of relief, was not intended to be disturbed; and a case in this court of a later date has reaffirmed that doctrine in the most explicit manner. (*Phillips v. Gorham*, 17 N. Y., 270.) In this case the point was very distinctly presented, and it was decided upon the fullest consideration. I think it proper to mention that the reason why I expressed no opinion in the case was, that I hesitated in regard to the power of the legislature under the Constitution to abrogate all the distinctions between legal and equitable actions. That such was the expressed intention of the legislature in the Code of Procedure, I never had any doubt. Both of these questions must now be considered at rest.

And in the next place, I do not see the grounds upon which the court below, in general term, reversed the order of the special term, giving to the plaintiff the right to put in a new or amended complaint in the action. I think the complaint

The New York Ice Company v. North Western Insurance Company.

was perfectly good, and that no amendment or substitution was necessary. It was much more clearly good in the so-called legal than in the so-called equitable aspect of the case. Nevertheless, the court corrected the judgment by adding the words, "or the plaintiff may serve a new complaint at law in this action on payment," &c. The judgment was entered December 23, 1859; notice of the motion for leave to add this clause to it was given in February following, and the order granting leave was made in July following. It is suggested in the opposing papers that the judgment had become perfect and final before the motion was made. I do not see the force of this suggestion. The judgment was perfect as soon as pronounced and entered. It would become final when the time for appealing should expire, but there is no pretence that this was ever limited by serving on the plaintiffs the notice required for that purpose. (Code, § 332.) I think the power of the court to modify or amend the judgment cannot be questioned. Even if the time for appealing had expired, I am by no means prepared to admit that this power would be lost. At all events so long as the judgment was subject to an appeal, it was subject to such corrections and modifications as the court which pronounced it might in its discretion think proper to make. The administration of justice would be extremely imperfect if this power did not exist. In this case the complaint had been dismissed at the trial, because the plaintiffs had failed (as the court thought) to prove the equitable ground of relief which he had alleged. By the modification afterwards directed, leave was given to file and serve a different, that is to say, an amended complaint. The judgment then was no longer absolute, but it would become so unless the plaintiff, within twenty days amended his complaint, and paid the specified costs. If an amendment was thought necessary this would have been extremely proper as an original disposition of the case at the trial. As the time for bringing a new suit had expired, justice plainly required that the case should be put in this situation; and as it was not so done at the trial, it was just that the omission should be supplied afterwards.

The New York Ice Company v. North Western Insurance Company.

In the next place, I am of opinion that the Supreme Court had no right to entertain the appeal at all from the order of the special term. That order, in its substance and nature, simply allowed a pleading to be amended in furtherance of the justice of the case. Such orders rest in the discretion of the court which makes them, they involve no substantial right and they are not reviewable on appeal. They do not belong to either class of orders which, according to the Code, may be reëxamined at the general term. (Code, § 349.) As incidental to the amendment applied for in this case, it was necessary to modify the judgment in its absolute character. But this was only a part of the discretion to be exercised on the application. Not even in this view was any substantial right involved, because it was merely a question of practice whether the legal merits of the case should be tried under an amendment of the pleading or in a new action. Leave to bring a new action had been originally given. The amendment simply gave leave, in the plaintiff's election, to go on in the same action after reforming his complaint. In all this I see nothing but practice and descretion which afforded no ground for a review.

But the inquiry remains whether the order of reversal, pronounced at the general term, can be reviewed in this court. We regret to find that there is no provision of law which authorizes such an appeal. The order appealed from does not, we think, "in effect determine the action and prevent a judgment from which an appeal might be taken." (Code, § 11, sub. 2.) On the contrary, it leaves in force a judgment in the action rendered upon the trial, from which an appeal might be taken, and, so far as we know, may still be taken. The case, therefore, does not seem to be embraced in any of the subdivisions of the 11th section of the Code, which is the only authority for appeals to this court. The appeal must therefore be dismissed, but without costs.

Appeal dismissed.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,
September Term, 1861.

SMITH, Executor, &c., v. DEVLIN.

The unexpired term for a year in a lease for three years, may be surrendered by parol. The statute (2 R. S., p. 134, § 6) relates to the estate of the tenant, and not to the terms of the instrument by which it is created. A finding, stated by the referee as one of fact, that there had been no surrender, construed by the help of his finding of law, as meaning only that there had been no surrender by writing.

APPEAL from the Superior Court of the city of New York. Action brought to recover one quarter's ground and water rent due upon a lease, under seal, for three years. The first two years' rents were paid; and the defence to the action for the first quarter's rent of the third year was, that the premises were surrendered by a parol agreement to pay \$100, and the delivering up of the keys of the house and the tender of the \$100, and that the plaintiff's testator did actually accept the surrender upon the agreement to discharge the lease for \$100, which was so tendered. The trial was before a referee, who, in the finding of facts, stated that "the lease was for a term exceeding one year, and the same has not been surren-

Smith v. Devlin.

dered, but is in full force and effect;" and then immediately follows the referee's conclusion of law, in which he finds that the lease, being under seal and for a term exceeding one year, could not be surrendered by parol, and that the defendant is liable for the rent.

The court, at general term, on appeal, held, that there being but a single year of the term remaining, it could be surrendered by a parol agreement, and reversed the judgment and granted a new trial; and the plaintiff tendered a stipulation as required by the statute, and appealed to this court.

John H. Reynolds, for the appellant.

John E. Develin, for the respondent.

MASON, J. The first question presented is, whether this remaining interest for the term of one year can be surrendered by a parol agreement. The statute declares that "no estate or interest in lands other than leases for a term not exceeding one year, nor any trust, or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." (2 R. S., p. 134, § 6.) The statute has reference to the actual estate or interest which is to be surrendered. When it excepts leases for one year, it refers to the estate or interest of the tenant; to his estate for a year; and not to the form of the lease by which that interest or estate is created or secured. In order to secure the true intent and spirit, we must regard this as only a lease for a year. So far as the estate or interest remaining under the lease is concerned, it is a lease but for a year. The referee, therefore, was wrong in holding that this remaining term for a year in a three years' lease could not be surrendered by parol, and in overruling the defendant's defence upon this ground. If the judgment of the referee be held to have proceeded upon this ground alone, there can be little

Smith v. Devlin.

doubt, it seems to me, that it was erroneous, and that the Superior Court were right in reversing it.

This brings us to the only remaining question in the case; and that is, whether the referee overruled this defence because he found the fact that there was no actual parol surrender. It was held at the general term that he did; and this, it seems to me, was clearly right. I know it is stated, in the finding of facts, that the term had not been surrendered; but we must construe this statement in the connection in which it stands. Now, the fact which precedes this statement, and which forms a part of the same sentence, is, that the lease was for a term exceeding one year; and, if we pass from this to the conclusion of law found by the referee, we find it to be, in substance, that the lease, being for a term exceeding one year, could not be surrendered by parol; and to this finding the defendant excepted.

Now it is nowhere stated in the conclusions of law, that this defence could not be sustained, because there was no parol surrender in fact. Nor is any reason assigned by the referee for the judgment which he gave. It seems to me, therefore, that we must construe this statement in the finding of facts, "*that the lease had not been surrendered,*" taken in the connection in which it stands, as meaning nothing more than that there had been no surrender because a lease for a term exceeding one year could not be surrendered by parol.

If I am right in these views, it follows that the court at general term was right in reversing the judgment of the referee and ordering a new trial; for where the conclusion of law drawn from the facts by the referee is erroneous, the judgment cannot be sustained; and it must appear that the facts found justify the judgment, where there is an exception taken to the conclusion of law, which the referee has drawn from the facts. The order granting a new trial must be affirmed, and final judgment be given for the defendant on this stipulation.

All the judges concurring,

Order affirmed, and judgment found for defendant.

Downing v. Marshall.

DOWNING v. MARSHALL.

Devise and bequest to the testator's son of real and personal estate for life, to go to his heirs in case he died leaving issue, and in case he should die without issue, to go to the testator's nephews and nieces. The son dying without issue before the testator there is no lapse, but the contingent limitation takes effect in favor of the nephews and nieces.

Personalty bequeathed to the executors in trust to apply the income to the son's support during life, and the principal to be paid to his issue, passed to the nephews and nieces, under a contingent limitation in their favor of all the real and personal estate devised and bequeathed to the son; the testator having elsewhere in the will referred to this fund as a part of his son's estate, though he had only a beneficial interest therein for life.

Under a devise of land, one-third part to the children of the testator's brother A, in equal shares, and one-third part to the children of his brother B, the children of each class take the share belonging to their class as tenants in common.

Where, by reason of a legal incapacity but one of the persons of a class can take, that one takes all the estate which the devise, by its terms, gives to the whole class.

Where, by reason of their alienage, none of the class is competent to take, the estate does not pass to the residuary devisees, but descends to the heirs of the testator.

The will attempted to devise real estate, used as a manufacturing establishment, to the executor in trust, to continue the factory in operation for two lives in being, and upon the death of the survivor of them, to sell the same; the income of the property, and the proceeds after its conversion, to be distributed to one unincorporated association and three corporations, for religious and charitable purposes: *Held*, that the provision failed as a trust to receive and apply the rents and profits of real estate, because the lives on which the trust depended, were those of persons having no interest in its performance, while the statute (1 R. S., p. 728, § 55, subd. 3) requires it to be dependent upon the life of the beneficiary.

2. The trusts attempted to be created are valid as powers in trust, so far as the beneficiaries are competent to take by devise.

3. The provision is void both as to real and personal estate, so far as respects the unincorporated association.

4. The prohibition in the statute of devises to corporations not expressly authorized to take by the legislature, renders void the power so far as it would operate to give the rents and profits of land for the benefit of the corporations not thus authorized. They can take no interest in land under a power created by will.

28	366
106	329
106	331
106	334
106	336
28	366
111	107
28	366
113	400
28	366
125	457
125	468
28	366
135	504
28	366
140	65
140	532
28	366
151	351
28	366
152	484
28	366
163	201
28	366
166	537

Downing v. Marshall

5. As to such corporations, however, the power to sell the land is valid. They are free to take money or personal property by testamentary gift, though it is to be raised by the conversion of land.

6. A provision in the charter of one of the corporations enabling it to take land "by direct purchase, or otherwise," is an express authority within the meaning of the statute of wills.

ACTION brought by the executors of the will of Benjamin Marshall, late of the city of Troy, in order to obtain the judgment of the Supreme Court as to the validity, construction and effect of several parts of such will. The defendants are the next of kin and heirs-at-law of the testator, and certain charitable and religious institutions or societies, to wit: The Marshall Infirmary, the American Bible Society, the American Tract Society and the American Home Missionary Society. The will was dated April 6, 1853, and the testator died on the 2d of December, 1858. His real estate at the time of his death consisted of his residence on Congress street in Troy, and of certain manufacturing establishments with a valuable water power, which was worth about \$150,000. He had also some wild lands in the State of Florida. His personal estate, besides his plate, furniture, &c., consisted principally of a bond and mortgage executed to him by B. S. and W. D. Walcott, which were a security for nearly the sum of \$150,000. At the date of the will the testator had an only son, John Stanton Marshall, who although of age was incapable of managing his own affairs by reason of imbecility or lunacy. He died without issue and unmarried, in 1857. The testator left a considerable number of kindred, the children and grandchildren of deceased brothers and sisters, all of whom were aliens except James E. Marshall a son of his brother James Marshall, and John W. Downing only child of a deceased sister. The original trial and hearing of the cause were before Mr. Justice GOULD, who pronounced a decree from which all the parties appealed to the general term of the Supreme Court. On that appeal the decree was reversed and modified in several respects, and various appeals were then taken to this court. The provisions of the will upon which

Downing v. Marshall.

the questions in the case arose, are stated in the following opinion.

Levi S. Chatfield, for the executors.

John H. Reynolds, for the Marshall Infirmary.

Marshall S. Bidwell, for the American Bible Society.

G. N. Titus, for the Tract Society.

John K. Porter, for the heirs and next of kin.

COMSTOCK, Ch. J. The testator, after directing his executors to pay his debts and funeral expenses out of any personal estate which might come to their hands, proceeded in the second clause of his will to devise and bequeath to his son John Stanton Marshall, his dwelling-house and lot on Congress street in Troy, together with his plate, household furniture and wearing apparel during the son's natural life, "and in case he shall die leaving issue, the same shall go to his heirs." In the third clause he bequeathed the Walcott bond and mortgage, a security amounting to nearly \$150,000, as follows: one-third part to his executors, upon trust to keep the same invested and apply the annual income to the support of the said John Stanton Marshall during life, and if he should die leaving lawful issue, then to pay the principal to such issue; one-third part to the children of the testator's brother James Marshall, in equal shares, and one-third part to the children of his brother Jeremiah Marshall; and in case any of the said children should die leaving issue, the share of the one so dying was to go to such issue. In the seventh clause it was declared, that if the said John Stanton Marshall should die without lawful issue, "all the real and personal estate above devised and bequeathed to him" was to go to the children of the said brothers James and Jeremiah, "to be divided and distributed amongst them in the same manner and proportions as directed in the bequest to them in article third above written." The only devise or bequest to the son John Stanton Marshall, is contained in the

Downing v. Marshall.

said second and third clauses, and consequently this contingent limitation in favor of nephews and nieces refers to those clauses only.

The first questions arise upon these provisions of the will. John Stanton Marshall, the son, having died without issue in the lifetime of the testator, it is claimed on the part of the benevolent institutions, that the limitation over in favor of the children of James and Jeremiah, embracing the real and personal property mentioned in the second clause, failed with the primary gift to him and his issue in that clause contained. These institutions being provided for in the residuary clauses to be hereafter considered, they further claim that the property, both real and personal, which is the subject of the primary gift and of the limitation over, sinks into the residuum, instead of descending to the heirs or passing to the next of kin, as undisposed of. In the judgment appealed from, it is determined that a lapse was occasioned by the death of the son without issue; that consequently the devise and bequest over did not take effect; that so much of the property here spoken of, as was personal, passed under the residuary clauses and that the real estate, being the residence on Congress street, descended equally to the two heirs-at-law, James E. Marshall and John W. Downing. These consequences might follow if it were true that the substituted devise and bequest to the children of James and Jeremiah were intended to take effect only in the event of John Stanton Marshall dying without issue after the death of the testator. But we see no reason for imputing such an intention, nor are we aware of any rule which requires such a construction. The substitution was to operate in the single event named, the death of the son without issue. The son and his issue were the primary objects of the testator's regard in these provisions of the will. If his bounty could not take that direction, he designed it for the children of the two brothers. Such being the general purpose, it was perfectly indifferent to him whether the ulterior limitation should take effect immediately on his own decease or at some indefinite time afterwards. He therefore declared, in plain words, that

Downing v. Marshall

the brothers' children should have this property if his own son should die without issue, and he did not qualify that contingency by still another which might prove, and in fact would prove, fatal to his main purpose. There is no ground for supposing that his wishes, in regard to the ultimate disposition of the property, depended in the slightest degree on the time when the son should die without issue. Whenever that event should occur, the other objects of his bounty were substituted. If the doctrine of lapse had been more attentively examined, it would have been seen that it has nothing to do with the question. Testamentary gifts are liable to failure in consequence of the ambulatory nature of wills which cannot take effect in favor of persons who die before the testator, because until then such instruments can have no effect at all. The principle of the lapse is the same as that which defeats the operation of a deed in favor of a person who is dead at the time of its execution. And whether the instrument be a will or a deed, if the ancestor be dead, the heir cannot take in succession to him. This rule has been changed by our statute in the case where the devise or bequest is to a child or descendant of the testator, who dies in his lifetime, leaving a descendant who survives the testator. In such a case the estate or interest given vests in the descendant of the legatee or devisee. (2 R. S., p. 66, § 52.) But the principle which, at the common law occasioned, and still may occasion, the lapse of a legacy or devise, can have no application to substituted gifts. The primary gift may lapse or fail if its object dies before the will can operate at all, but this has no tendency to defeat an independent and ulterior limitation to other objects who are living at the testator's death. In such cases the question is not one of lapse, but of interpretation and intention in regard to which, in the case before us, we think there is no room for doubt. (1 Jarm. on Wills, 293; *Norris v. Beyea*, 3 Kern., 273.) We are of opinion, therefore, that on the death of the testator, the dwelling-house, plate, furniture, &c., mentioned in the second clause of the will, vested according to the seventh clause in the children of the brothers, James and Jeremiah,

Downing v. Marshall.

then living. The modification of this result, as to the real estate, by reason of the alienage of all those children, except one, will be presently noticed.

Upon the same grounds a like conclusion must be adopted in regard to the one-third part of the Walcott mortgage, the income of which, according to the third clause, was to be applied to the support of the said John Stanton Marshall during his life, and the principal of which was to be paid to his issue, if he should leave any, provided the substituted limitation in favor of the brothers' children was intended to embrace this fund also. The subject of that limitation, as we have seen, was described as "the real and personal estate above devised and bequeathed to" the testator's son. The benevolent institutions and societies, as residuary legatees, insist that this description does not include the said one-third part of the Walton mortgage. But we think otherwise. Nothing but a life interest was given to the son in any of the property in question, whether mentioned in the second or third clauses. This is expressly so declared in both those clauses. If he died leaving issue, such issue were to take, not as his representatives, but directly from the testator as his devisees or legatees. It is manifest, therefore, that "the real and personal estate above devised and bequeathed," according to the descriptive words of the seventh clause, is the real and personal estate in which a life interest only was devised and bequeathed to the son; and the description thus understood is quite as applicable to the one-third of the Walcott mortgage mentioned in the third clause, as to the dwelling-house, plate, &c., mentioned in the second; unless indeed it be a distinguishing circumstance that the gift of the mortgage fund is in terms to the executors upon trust. But we think this is not a material circumstance. The gift was beneficially to the son, and, notwithstanding the trust it constituted, in the view of the testator, the son's estate, and he described it in that manner in the ulterior limitation. In another clause of the will (the 8th), there is an undoubted reference to this mortgage under the descriptive words "the income of my said son's estate." Here we find the one-third

part of the mortgage spoken of as the estate of the son. The testator's language was not accurate, but we entertain no doubt that he intended to give the principal of this fund to the children of the brothers on the death of his son without issue. This conclusion does not seem to have been questioned in the court below; but, as already mentioned, on the ground of lapse, the fund was adjudged to belong to the residuary legatees. That there was no lapse, has been already shown.

There were at the death of the testator eight children of James Marshall, all of whom were aliens, except James E. The children of Jeremiah Marshall were six in number, and all of them aliens. The only kindred of the testator capable of inheriting real estate were the said James E. Marshall and John W. Downing, the son of a deceased sister. It follows, that of the two classes of children who were the objects of the devise and bequest in the seventh clause, only James E. Marshall could take by devise, and that the Congress street house and lot, except the interest to which that clause entitled him, either descended to him and Downing equally as heirs-at-law, or else passed under the residuary clauses of the will. The question next to be considered is whether James E. Marshall took by the devise only one-eighth of one-half, or one-half, being the whole interest which the devise by its terms gave to the class of children to which he belonged. According to the decision made at the original hearing of the case he took under the will, only the smaller or fractional part. On the appeal in the Supreme Court it was held, erroneously as we have seen, that the whole devise had lapsed.

I come to the conclusion with some hesitation that James E. Marshall took under the devise one-half of this real estate. The limitation in its terms is to the children of the brothers James and Jeremiah, "to be divided and distributed amongst them in the same manner and proportions as directed of the bequest to them in article third above written." In the third article, as we have seen, there is a direct bequest of one-third of the Walcott mortgage to the children of James in equal shares, and a like gift of another third to the children of Jere-

miah. These are the bequests referred to in seventh clause as regulating the proportions in which the contingent devise and bequest of the house and other property was to vest in the two classes of children. Each class was therefore to take one-half, and the equality of the shares refers necessarily only to the divisions of interest amongst those embraced in either class. But of the children of James, one and one only could take according to the statute, which declares a devise to aliens void. Upon the point whether he is entitled to take all that was intended for him and his brothers and sisters, we have no key to the intention of the testator, because the testator assumed that all were equally competent, and he framed the devise accordingly. We must therefore ascertain, if possible, the rule of law to be applied to such a case.

Where a devise or bequest to two or more persons by name is in such form as to create a joint tenancy, and one of them dies before the testator, it is well settled, that the whole interest vests in the survivors; and this result will take place if the gift fails, as to one of the persons from any other cause than death. (1 Jarm., 295; Amb., 186; 3 Bos. & Pul., 16.) It is equally clear that when the limitation creates a tenancy in common, the gift being to several persons by name and not to them as a class, the same consequence will not follow from the death of one of them. In such a case, the share of the one dying before the testator, or before the time when it is to vest, is lapsed. In the present case, all the children of the brothers living at the death of the testator, and competent to take, would undoubtedly take as tenants in common. When an equality or inequality of shares is prescribed in express words, the language was always held to create such a relation. But the devise was not to the children by name but to them as a class, and in such a case, although a tenancy in common may result, the same consequence does not follow as to the share of one of the class who has died, or for some other reason cannot take. Mr. Jarman says, "where the devise or bequest embraces a fluctuating class of persons, who by the rules of construction are to be ascertained at the death of the testator, or

at a subsequent period, the decease of any of such persons during the testator's life will occasion no hiatus or lapse in the disposition, even though the devisees or legatees are made tenants in common, since members of the class antecedently dying are not actual objects of the gift." "Thus," he adds, "if property be given simply to the children or to the brothers and sisters of A, equally to be divided between them, the entire subject of gift will vest in any one child, brother or sister, or any larger number of these objects surviving the testator, without regard to previous deaths." (1 Jarm., 295, 296.) In *Doe v. Sheffield* (13 East., 526), there was a devise of land to the "sisters" of J. H., expressly, as tenants in common, and to their heirs and assigns forever. There had been three sisters of J. H., but only one was living at the death of the testator, or at the date of the will. It was held that she was entitled to the whole. So in *Viner v. Francis*, (2 Bro. C. C., 658,) a legacy of £2,000, was given in equal shares to the "children" of a deceased sister of the testator, of whom there were three at the date of the will, but one died in his lifetime. It was held, that the two survivors were entitled to the whole sum. (See, also, 3 Hare, 348.) I do not find in the books the exact case where the gift was to a class of persons as tenants in common, some of whom were incapable of taking by reason of alienage. But such a case falls within the principle of those referred to. Whether the impossibility of taking is a natural one arising from the death of one or more of the devisees, or whether it flows from a legal incapacity, the result appears to me the same. In the example before us, the testator contemplated the objects of his bounty as a class, and not as individuals. The gift was to vest whenever his son should die without issue, and in fact it vested as soon as the will took effect by the decease of the testator himself, the contingent event having previously occurred. We think that James E. Marshall then became entitled to the one-half of the real estate in question, as the only competent representative of the class to which it was devised.

All the children of Jeremiah Marshall being aliens, none of them were competent to take the other half of the house and lot under the devise to them. On behalf of the Marshall Infirmary and the religious societies, it is claimed that this interest passed under the residuary clauses of the will. But we think otherwise. The statute declares that real estate so devised "shall descend to the heirs of the testator; if there be no heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be, competent to take such interest." (2 R. S., 57, p. § 4.) This statute plainly leaves no room for a distinction in this respect between a void and a lapsed devise. According to some authorities, if the disposition was originally invalid, the residuary devisee takes the estate in opposition to the rule which prevails in case of a lapse. I think the distinction was never well founded. It was rejected by the Court of Errors of this State, after the most elaborate consideration, in the case of *Van Kleek v. The Dutch Church* (20 Wend., 457), where the devise was assumed to be void, because made to a corporation. If void by reason of the alienage of the specific devisee, the statute, in plain terms, seems to repel any such distinction. One-half of the real estate now in question therefore descended to the heirs, and the result is, that on the death of the testator, James E. Marshall became entitled to three-fourths of the whole (one-half by devise, and one-fourth by descent), and John W. Downing to the remaining one-fourth.

The most important questions in this case arise upon the residuary dispositions of the will. In the fourth clause, the testator devised and bequeathed to his executor "all the rest and residue of his real and personal estate whatsoever and wheresoever situated," upon the trusts declared in the fifth and sixth articles. By the fifth article, he directed the executors to continue in operation the manufacturing establishments called the "Ida Mills," in Troy, in such manner as they should deem best, during the natural lives of Joseph Marshall Coville, of New York city, and Joseph Marshall, of North Adams, Massachusetts, and of the survivor of them, or so long within

their lives as, in the opinion of a majority of said executors, the same could be done without material injury to the interests of the estate, and of those participating in the income thereof, and to distribute and appropriate the net annual income or profits thereof, and also the net annual income of all other real and personal estate not otherwise disposed of by the will, as follows: One-half in equal shares to the American Bible Society, the American Tract Society and the American Home Missionary Society, and the other half to be expended in supporting and maintaining the Marshall Infirmary in the city of Troy, for the support of poor and indigent, sick and lame persons. In the sixth clause, the executors were directed, on the death of the said Joseph Marshall Coville and Joseph Marshall, to convert into money or otherwise dispose of the real and personal estate so devised and bequeathed to them in trust, and to distribute and deliver over such moneys or estate to the several legatees for the objects named in the fifth clause, and in the same proportions as therein directed in respect to income. The property embraced in these clauses of the will was principally the *Ida Mills*.

I am clearly of opinion that a trust to receive the rents and profits of real estate, and apply them to the use of the beneficiaries named, was marked out in these provisions. The mills were to be carried on by the executors, to whom, as trustees, the legal estate was expressly devised. It is true that the annual income of the business would be a complex result flowing from the use of the water-power, the machinery and the mills; from the profit of capital, and the employment of labor. The material consideration is, that the use or profit of land would be one of the constituents in producing that result; and it might be the principal one. The executors were to have the possession of these establishments, and to operate them for the benefit of the institutions or societies which were the objects of the testator's benevolence. In this manner the profit of land was to be received, and, in combination with other elements, it was to be paid over to the beneficiaries. In a trust to receive the rents and profits of real estate, it is not implied that the trustee must

lease the estate, because that is not the only or the most usual mode of perception. As the owner of land may lease or occupy it, so, in creating a trust, he may provide for receiving the use or income in either of these modes.

But, although trusts to receive and apply rents and profits may be created under the statute of uses and trusts, the one in question is not constituted in the manner which that statute prescribes. The application of rents and profits must be "to the use of any person during the life of such person, or for any shorter term." (1 R. S., p. 728, § 55, sub. 8.) The trust must, therefore, be made dependent on the life of the beneficiary. In this case the beneficiaries are associations, incorporated or unincorporated; while the lives on which the trust depends are those of two natural persons having no interest in its performance. Such a limitation is plainly unsupported by any construction which we can give to the language of the statute.

We are next to inquire, whether, in the law of trusts and powers, there is any other mode of giving effect to the testator's intention. The law on this subject underwent a considerable change in our revision of 1830. But there has been, I think, some misapprehension as to the character and extent of that change. All express trusts were abolished, except certain ones enumerated in the fifty-fifth section of the statute, which were, 1st, to sell lands for the benefit of creditors; 2d, to sell, mortgage or lease lands for the benefit of legatees, &c.; 3d, to receive the rents and profits of land and apply them, &c.; 4th, to receive the rents and profits of lands and accumulate the same, &c. (1 R. S., p. 728.) The impression has prevailed to some extent that these provisions of law have taken from owners the power of impressing upon their estates any limitations having the general characteristics of a trust, except such as are thus enumerated.

That this impression is not well founded will appear on a brief consideration of the subject. At the common law, fiduciary interests in land under the name of uses might be created without any restriction depending on the object or purpose of the trust. Limitations of this character were enforced upon

the conscience of him who held the legal estate. Prior to the statute of uses (27 Hen. VIII), these limitations were, perhaps, only known in their simplest and most elementary form, that is to say, in the form of legal estates held by one person for the benefit of another, without any active duty or trust. In this form they were abrogated by that statute. This was done, not by defeating the feoffment or devise, to such a use, but by vesting the legal estate in the beneficiary. After the statute, uses were revived under the name of trusts. By a strict construction of that enactment, passive trusts might still be created by limiting a use upon a use; it being held that the statute only executed the use in the first *cestui use*, who was allowed to hold the estate for the benefit of the second. This was doubtless an evasion of the letter and policy of the statute; but neither its letter nor policy stood in the way of creating active trusts, that is, legal estates, impressed with some active duty in their control, management or disposition for the benefit of some person or class of persons other than the trustee. Trusts of this kind grew up and expanded to meet the wants and wishes of mankind. They were undefined by any statute or rule. The reason, or occasion, for vesting the legal title in a trustee, appears to have rested in the discretion of the author of the trust. Where the instrument did not in terms so vest the title, there was always a question whether the nature of the trust, or duty declared, was such as to render the presence also of the legal estate necessary or convenient. If so, the title was deemed to vest in the trustee accordingly. If not, then it remained in the donor, or his heirs, subject to the trust as a power. Powers were no less undefined than trusts. The intention as to the legal estate being unexpressed, powers began where trusts terminated. But, to ascertain the dividing line between them was often attended with difficulty, and perplexing questions frequently arose. (*Brewster v. Striker*, 2 Comst., 19.)

Such was the state of the law at the time of our revision of 1830. We had enacted the English statute of uses at an early day, but had made no other change in jurisprudence on this subject. The system of trusts was a complicated one, and was

believed to be attended with great inconveniences. These it was proposed to remedy, not by depriving men of the power of disposing of their estates, nor even by abridging that power, but by giving effect to such dispositions according to a more simple classification so as to relieve this branch of the law from much useless refinement and perplexity. Trust estates of a character purely passive, which might exist in various forms, notwithstanding the statute of uses, were justly considered wholly unnecessary. These were accordingly abrogated; but this was not done by defeating such limitations entirely. On the contrary, the policy of the former statute was enlarged by new and appropriate provisions which vested the title in the beneficiary. (1 R. S., p. 727, §§ 47, 49.) The utility of active trusts was not questioned. But these were believed to be capable of great abridgment, and of a precise and accurate definition; and they were defined in the 55th section above mentioned. All other express trusts were abolished (§ 45) by which the Revisers and the legislature intended simply that legal estates impressed with trust duties and powers should be created only in the cases specified. The provisions of the statute were aimed against the attempt to create such estates or titles, but not against the duty, trust or power. This is perfectly manifest from the provision which declares that if an express trust be created for any purpose not enumerated, no estate vests in the trustee, but if the trust authorizes the performance of any act lawful under a power, it shall be valid as a power in trust. (§ 58.) There was, very wisely, no attempt to enumerate or define the acts which might be lawfully done under a power, and in that respect, therefore, the law was subjected to no innovation. The result is, that express trusts, using that term in the strict technical sense as descriptive of legal titles, vested in a trustee for the fiduciary purposes declared in the instrument, were abridged and confined to the enumerated classes. But the trust limitation, although not belonging to that class, if not otherwise unlawful, will be effectuated in a different mode. If of a passive character, the use is executed by vesting the title in the beneficiary

If active, it takes effect as a power in trust, leaving the title in the donor or his heirs, subject to the power. And thus, as the old statute of uses which was intended to abolish passive trusts, left the widest field for the creation of active ones, so our revision, in abrogating all active trusts, except the few particularly specified, has reanimated them under the name of powers which are left without restriction, provided the purpose of the limitation or power be in itself a lawful one. The statute, it is true, enunciates a code on the subject of powers also, but it makes no attempt to enumerate or define the lawful occasion for creating a power.

Referring now to the residuary devise in question, we have seen that it does not belong to the class of active trusts permitted by the statute. It is also clear that the statute does not execute the uses intended by vesting the legal title in the beneficiaries. This is clear because the trusts impressed by the will upon the estate devised to the executors are of the most active description, requiring them to take the possession and management of the property into their own hands. The limitation must, therefore, take effect as a power in trust or be defeated altogether. To giving that effect to it there is no objection if the beneficiaries are competent to take, and if the acts prescribed to be done are lawful in themselves. It needs no argument to prove that it is lawful for the owner of land to devote the rents and profits to the use of any beneficiary, under no incapacity to receive them by any instrument to take effect during his life, or by his last will, provided the limitation does not violate the rule as to the alienability of estates. It is equally clear in this case that nothing more than a power was vitally necessary to carry on the testator's manufacturing establishments, and to apply the net income in the manner he prescribed. That the presence of the legal title would be highly convenient for these purposes may be admitted; and it may also be admitted that the Revisers committed a grave error in attempting to define all the proper occasions for creating a trust estate. The rule against perpetuities was not violated by this devise; because it did not attempt to suspend the power of alienation beyond two lives

in being, at the death of the testator. (1 R. S., p. 723, §§ 14, 15.) It is plain, also, that the ultimate trust to sell and distribute the proceeds contemplated an act lawful in itself, but which did not require the presence of the legal estate in the trustees. ✓

It follows from these views, that the residuary dispositions of this will failed to vest in the trustees the legal title of the real estate embraced in them: in other words failed to create a technical trust as the testator intended. But it also follows that those dispositions were valid as powers in trust, so far as we have yet examined the question. The difficulties which remain to be considered arise out of the alleged incapacity of the beneficiaries in whose favor it was intended to create the trust. The American Home Missionary Society was an unincorporated association having a regular organization, its object being the spread of the Gospel in this country. The American Bible Society was incorporated by act of the legislature in the year 1841, for the purpose of promoting the circulation of the Holy Scriptures. The second section of the charter declares that the net income of the society arising from its real estates, shall not exceed the sum of \$5,000 annually. The third section declares that the corporation shall possess the general powers, and be subject to the provisions of the third title of chapter eighteen, part first of the Revised Statutes, so far as the same are applicable and have not been repealed. (Laws of 1841, p. 41.) The American Tract Society was incorporated in the same year, The income of its real estate was restricted to \$10,000, and the charter contains a like reference to the Revised Statutes. (Stat., p. 249.) In those Statutes the general powers of all corporations are defined, and among them is the one "to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. (1 R. S., p. 599, § 1, sub. 4.) In regard to these two societies it is not claimed that the devise now in question, if upheld, will carry their real estate or the income therefrom to an amount exceeding the limits prescribed in their respective charters. ✓ The Marshall Infirmary was incorporated in the year 1851, and was declared "capable of taking by direct purchase

or otherwise, holding, conveying, or otherwise disposing of any real or personal estate" for the purposes of the corporation, so that the net annual income should not at any time exceed \$20,000. (Laws of 1851, p. 537.) It is conceded that the provision made by this testator will not carry the amount beyond the prescribed sum. The claims of these beneficiaries are now to be considered with reference to the character and capacity of each.

✓ And, first, we think that the residuary devise and bequest were void as to the unincorporated Home Missionary Society. That society is composed of a fluctuating and unascertained class of persons, having no legal capacity to take the gift. The beneficiaries are the entire community within the influence of the society. There is no trustee competent to take the fund so as to secure its appropriation to the benevolent purpose intended. That such a gift is void according to legal rules, it needs no argument to prove. There is no trustee, and there are no beneficiaries ascertained, either as individuals or as a class of persons. These objections are fatal. It is said that a trust shall never fail for want of a trustee, because a court of equity will supply the defect. But this is true only of a valid trust, and in order to be valid, it must be so constituted that a title can vest in some person, natural or artificial, by force of the gift itself. The principles on which this question depends have heretofore been fully examined by this court. A charitable donation, precise and definite in its purpose, void at law because the beneficiaries are unascertained, may be maintained if there be a competent trustee to take the fund and effectuate the charity. If there be no such trustee it fails, and the heir or next of kin is entitled. (*Williams v. Williams*, 4 Seld., 525; *Owens v. The Missionary Society*, 4 Kern., 380; *Beekman v. Bonsor*, ante, 298.) It is true in the present case, that according to the dispositions made by the testator the executors were appointed the devisees and legatees in trust; but they were not constituted trustees of the charity. The objects of the charity were mankind in general, or that portion of mankind within the sphere of the missionary labor carried on by the society. It had no trustees except the unincorporated persons

forming the society itself. The duty of the executors would be fully performed by paying over the income, and ultimately the principal, of the fund to any agent of those persons. Those persons were a fluctuating body unknown to the law, irresponsible to the courts, and incapable of receiving a gift even for a purpose which the law may denominate charitable.

The claims of the Bible and Tract Societies may be considered together, because they are each incorporated with powers entirely similar. Their charters, by limiting the amount of income to be derived from real estate, imply that real estate may be taken and held by them, but being silent as to the mode of acquisition, the general statute in regard to corporations, which has been mentioned, must be referred to as the source of power in this respect. By the terms of that statute, as we have seen, corporations are authorized "*to hold, purchase and convey*" real and personal estate not exceeding, &c. This statute, by itself, contains no prohibition in respect to the manner of acquiring the real estate which corporations may hold, while, on the other hand, it confers no express authority to take by devise. But the same legislature which enacted this statute also enacted the existing statute of wills, by which it is declared that "no devise to a corporation shall be valid unless such corporation be *expressly* authorized by its charter, or by statute, to take by devise." (2 R. S., p. 57, § 3.) Effect must be given to both these enactments, and the conclusion is plain that the general authority which all corporations possess to take and hold real estate does not include power or capacity to take by will. Indeed, the English statute of wills passed in the reign of Henry VIII, which was an enabling act and was reenacted at an early day in this State, contained an exception of bodies politic and corporate. It requires no further argument to show that these two societies could not acquire real estate in this manner.

The question remains, however, whether the residuary clauses of the will, so far as intended to benefit these two corporations, were so framed as to fall within the prohibition against devising to such bodies. As we have seen, the inten-

tion of the testator was to create a trust under which these societies were to share in the profits and income of real estate during two lives, and then the same real estate was to be converted into money and they were to share in the distribution. By a legal necessity, as we have also seen, the trust can be maintained only as a power. The inquiries now are, 1, whether the statute of wills prohibits these two corporations from sharing in the use and profit of the land during the two lives mentioned in the devise; and 2, whether they will be entitled to share in the proceeds of the land when the time shall arrive for converting it into money as the will directs.

In the case of *McCartee v. The Orphan Asylum Society* (9 Cow., 437), it was held by Chancellor JONES that a devise of real estate to executors in trust for a charitable corporation was valid, notwithstanding the exception in the statute of wills then in force. This conclusion was maintained in an opinion of great learning, but much too extended to admit of a particular review. The general course of reasoning was, however, as follows: The English statutes of mortmain, in force from an early period in the history of that country, prohibited the acquisition of land by corporations, and this prohibition was extended to uses by a statute passed in the reign of Richard II. Prior to that time the ecclesiastics had evaded the mortmain acts by procuring lands to be conveyed to natural persons for the use of religious houses or bodies, and the clerical chancellors had enforced the use. The statute of 15 Richard II, (ch. 5) was enacted to prevent this evasion. According to the principles of feudal law, lands could not be devised at all; but as uses were considered separate from the land upon which they were impressed, a person entitled to a use could, before the statute of Richard II, devise it to an individual or a corporation. The statute of wills (34 Hen. VIII, ch. 5) contained an exception as to bodies politic and corporate; but this exception was to prevent an implied repeal of the mortmain acts. Without that exception, the general power of devising would include devises to corporations. In this State all the mortmain acts were repealed, and the statute of wills was reenacted with

the same exception. But the exception was not, with us, as in England, auxiliary to a mortmain system of law and policy. Our statute of wills, therefore, simply failed to confer on devisors a capacity of devising to a corporation; and it was consistent with legal principles to overcome that difficulty by allowing corporations to take from a third person to whom lands might be devised in trust. All the statutes of mortmain, including those which related to uses, being repealed, a use could be devised, as at the common law, without the enabling statute of wills. That statute was only required to render legal estates devisable; and the exception, therefore, only applied to such estates. It created merely a technical difficulty, founded in no policy, which might be obviated by any technical contrivance. Thus, a wife cannot convey to her husband, but she can to a third person, from whom the husband can receive the use or the title. So the owner of lands could not devise them to a corporation, but he could to a natural person in trust for a corporation. Even if these views were untenable, and a devise in trust should be held as embraced within the exception to our statute of wills, then the learned Chancellor thought that, where the trust was for a charity, it was maintainable notwithstanding that statute. I have given the substance of the reasoning by which the conclusion was maintained in few words, and in the best manner I am able.

The Court of Errors reversed the decree of the Chancellor, on the ground that the devise was direct to the corporation, and not in trust. It was a gift to a charity of the very highest merit, and the court of last resort therefore necessarily determined that the doctrine of charitable uses could not be invoked to maintain a gift to a corporation void at law, because not permitted to be made by the statute of wills. On this point, decisions the other way can be found in England, founded on the idea that the statute of charitable uses (43 Eliz.) created in favor of charities an exception to the mortmain acts, and modified the exception in the statute of wills. (4 Kent's Com., 507, and note.) But the statute of 43 Elizabeth was never in force in this State, and it was, moreover, repealed at an early day

It is plain, therefore, that a devise to a charitable purpose cannot be sustained, if made to a corporation in violation of the statute of wills.

The decision of the Court of Errors left untouched the question whether a devise in trust for a corporation was valid. The views of Chancellor JONES on that point were neither affirmed nor disaffirmed. Without fully accepting them myself, I do not propose to criticise them. Very soon after the decision of the Chancellor in that case, the existing statute of wills was proposed and adopted in the legislature as part of the Revised Statutes of the State. The senate was the same body which participated in the determination of the case in the Court of Errors. In place of an exception which, as had been contended, simply withheld capacity to-devise in favor of a corporation, a broader enactment was substituted, intended to prohibit such devises. The statute was so framed as to declare that all persons, except idiots, &c., may devise their real estate: that every estate and interest descendible to heirs may be so devised: that such devise may be made to any person capable by law of holding real estate; but it was added that "*no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise.*" In this form the statute was designed to be prohibitory, and to leave no room for the subtleties and refinements which had obscured the subject. The language is so broad as to include every interest which is capable of being devised. Uses and trusts, not less than legal estates, fall under the prohibition. The enactment is, moreover, founded in a just policy, which ought to be faithfully maintained. It is said we have no mortmain policy or statutes. But this is not so. The exception in the former statute of wills was with us intended to prevent devises of real estate from being made to corporate bodies, where it would be locked up in perpetuity, and also to prevent languishing and dying persons from being imposed upon by false notions of duty prompting them to disregard the claims of family and kindred. The positive statute we now have is still more distinctly founded in that policy, and it was enacted to

solve the doubts which great learning and ingenuity had suggested. It is a statute of mortmain resting on a mortmain policy, as distinctly as any act of the British Parliament. The condition of society and the freedom of religious opinion in this country have rendered the necessity of still greater restrictions on the power of acquiring real estate by corporations, less apparent than formerly in England. But the necessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. The legislative grant of the power is the equivalent to the license from the crown, which, according to an act of Parliament, might dispense with the mortmain statutes in Great Britain. Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interests of charity and religion. But in the last hours of life exaggerated impressions of charitable or religious duty often obscure the judgments of men, and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes, that the sentiments of men in such situations are most generally appealed to. The enactment is therefore prohibitory, and it ought to be expounded and applied in that sense. The learned Revisers, in reporting it to the legislature, observed in the accompanying note, "it has been put in the form of a positive prohibition with the view of calling the attention of the legislature to it, that it may be retained if it is intended to be prohibitory, or may be expunged if deemed unnecessary. It is a question now agitated in our courts, whether it is to be considered as a prohibition or not." The legislature adopted the section without alteration, and we are consequently left in no doubt as to its spirit and policy.

I entertain, therefore, a decided opinion that the residuary devise in question cannot be sustained for the benefit of the Bible and Tract Societies, so far as it relates to the use and profit of the land during the two specified lives. It can make no difference, that in consequence of the invalidity of the

Downing v. Marshall.

trust, it could take effect only as a power, even if the beneficiaries were authorized to take by devise. The result of the disposition is the same, whether we call it a trust or a power. In either mode of sustaining the devise, the rent and profit of land is the thing given, and as no interest in land can be lawfully devised to a corporation, the technical character of the limitation is immaterial. That which the law forbids to be done at all, cannot be accomplished by a merely formal change in the mode of arriving at the result.

Upon the question whether the ultimate direction to sell the real estate in question and pay over the proceeds at the expiration of the two lives mentioned, is valid as to the Tract and Bible Societies, the views of the court will be expressed by Judge DENIO. This point has appeared to me involved in some doubt, but I do not dissent from his conclusion, which is in favor of the validity of that direction.

We are next to determine the rights of the Marshall Infirmary. That institution, we think, is expressly authorized by its charter to take by devise. As we have seen, the power given is to take "by direct purchase or otherwise." The word purchase must be taken to have been used in its popular sense, and not to include acquisition by will. This was held in the case of *McCartee v. The Orphan Asylum*, where the authority was, to take by purchase merely. In this sense the term is used in the general statute before cited, defining the powers of corporations, and in all special charters granted by the legislature, where it is not intended to confer the power of taking by will. But in the charter of the institution now in question, an additional term was used broad enough to include every mode of acquiring real estate. According to the statute of wills, the authority to take by devise must be express. But this only means that corporations, as such, cannot take in that manner, as they can by purchase, for the purposes of their organization. In giving express authority to take and hold by devise, that term is not necessary to be used. In all language that is expressed which the words, fairly interpreted, mean. When the legislature, in granting this charter, said

Downing v. Marshall.

that real estate might be acquired by purchase or otherwise, I see no reason to doubt that all the modes known to the law were intended. If we hold this not to be so, then we must say that the additional word, inserted apparently with care and contrary to the general course of legislation, is destitute of all meaning. The charter would exclude every take by gift, whether made by will or deed; but "exchange," in the popular sense, implies an exchange, and it is not to be supposed that the legislature would create an institution with such a restriction. The testator appears to have been the founder of this charity, and undoubtedly the cherished object of his care. Its purpose is, to the highest degree, meritorious; and I am unwilling to put upon its powers a technical and narrow construction which the language of its charter does not demand, and which would entirely defeat the liberal endowment he designed for it.

Other questions of minor importance were suggested on the argument. One of these relates to the compensation of the executors, it being supposed that some part of the duties assigned to them, respectively, has been abrogated by the failure of material portions of the will. Another relates to the fund out of which the remaining debts of the testator ought to be paid. These matters have not been passed upon or considered in the courts below, and we have, therefore, nothing to review in respect to them. Nor are we satisfied that all the facts for a proper judgment upon them are now before us. A final decree in the case should embrace the entire controversy, and we therefore think it inexpedient to pronounce one in this court. Another hearing can be had in the special term of the Supreme Court, when the main questions will be regarded as disposed of by the decision we make, and a final judgment will be rendered upon all the points which may arise. We therefore reverse the judgments of the general and special terms, adopting the conclusions indicated in this opinion. Those conclusions are as follows: (1.) The contingent devise and bequest contained in the seventh article of the will, in favor of the children of the brothers, James and

Downing v. Marshall.

Jeremiah, did not lapse or fail by reason of the death of the son, John Stanton Marshall, without issue, in the lifetime of the testator. (2.) That devise and bequest embrace not only the real and personal property mentioned in the second article, but also the one-third part of the Walcott mortgage mentioned in the third, of which the income was therein given to the said John Stanton Marshall, during life, and the principal to his issue, if he should have any. (3.) Upon the decease of the testator, the undivided half of the dwelling-house and lot mentioned in the second article, vested, according to the seventh article, in James E. Marshall, the only child of James Marshall, who was not an alien; and the other half did not go into the residuum, but descended equally to the heirs-at-law, James E. Marshall and John W. Downing, all the children of the brother Jeremiah being aliens. In this connection we have considered the question whether John W. Downing has any possessory right to the said house under the eighth article of the will, and we think, in accordance with the decision of the court below, that he has not any such right. (4.) The personal estate mentioned in the second article, and the said one-third of the Walcott mortgage mentioned in the third, on the death of the testator vested, according to said seventh article, in the children of James Marshall and Jeremiah Marshall, then living, that is to say, one-half in each family of children, as a class, such children sharing equally with each other. (5.) The residuary devise and bequest failed as a trust in respect to the real estate therein embraced: that is to say, the title to such real estate did not vest in the executors as trustees. But the trusts attempted to be created are valid as powers in trust, so far as the parties intended to be benefited thereby are competent to take by devise. (6.) The Home Missionary Society, being an unincorporated association, is incompetent to take either real or personal estate, and the residuary clauses of the will, are so far wholly void. (7.) The American Tract Society and the American Bible Society being corporations without power to take real estate by will, the residuary devise is void as to them, so far as it relates to

Downing v. Marshall

the rents and profits of the land or net annual income to arise from carrying on the Ida Mills, as the testator directed. (8.) But those societies will be entitled to share in the proceeds of the sale and conversion of the said mills, and real estate to be ultimately made, as the will directs. The trusts in their favor are also valid as to any personal estate embraced therein. (9.) The Marshall Infirmary is authorized to take by devise, and the trusts to receive and pay over the rents and profits or net annual income to arise as aforesaid, as well as the trust to sell and pay over the proceeds, are so far valid as powers in trust. (10.) All the real estate mentioned in the residuary clauses of the will descended to the testator's heirs, subject to the trusts declared in said clauses as powers in trust, so far as the same are now adjudged to be valid. The Marshall Infirmary is entitled to one-half the rents and profits or net annual income from the death of the testator. The other half belongs to his heirs-at-law. Such real estate will be ultimately sold, as the will directs. The Marshall Infirmary will be entitled to one-half the proceeds of such sale. The American Bible and the American Tract Societies will be entitled each to one-sixth, and one-sixth will go to the testator's heirs.

The judgment must be reversed, and a new hearing must be had in the Supreme Court, with costs of suit, including this appeal, to abide the final direction of that court.

DENIO, J. It is contended that the direction to sell the residue of the estate and pay the proceeds to the societies is void (except as regards the Marshall Infirmary), on the sole ground that it is forbidden by the statute making void devises to corporations, in these words: "But no devise to a corporation shall be valid, unless such corporation be expressly authorized," &c. (2 R. S., p. 57, § 3.) I think the statute does not affect the case.

I. According to the earlier part of the opinion of the Chief Judge (in which I concur), it is shown that there is no devise of the land to any one. There is only a power. Although we concede that so much of the power as relates to the rents

Downing v. Marshall.

and profits is void, there still remains a distinct authority to sell the land and pay over the proceeds. A power to a trustee (unaccompanied with an estate) to sell lands and pay the proceeds to a given person or institution, is not, in any legal or popular sense, a devise to such person or institution. There is not, therefore, in the case, any devise to a corporation, and, for that reason, the statute has no application.

II. If it could be maintained that there was an interest of any kind devised or bequeathed to the corporations, it is not land or real estate. The direction to sell is a conversion into personal property. I think there is no authority for saying that, under such a direction, the corporations could claim the land.

III. The cases under the statute of 9 George II (ch. 36, § 1), commonly, but improperly, called the mortmain act, are not applicable:

1. That statute has not been reenacted in this State. Though adopted in England before the Revolution, and the question as to its incorporation into our system being before the legislature when the general English statutes were reenacted, it was not embraced among the laws retained. Its special policy was not approved. It may rather be said to have been condemned.

2. It is not *in pari materia* with our statute above mentioned, avoiding devises to corporations. The two statutes were not passed in furtherance of the same or a kindred policy, for the apparent motives for the two enactments are quite different. (1.) The English act does not forbid devises to corporations, any more than to natural persons. The provisions are aimed against charities, and not against corporations. Every disposition to a corporation, which would be good if made to a natural person, is valid, though made to a corporation. (2.) Our act has no reference to charities, but only to corporations.

3. The cases under the act of George II, to which reference is made by the respondent's counsel, proceed upon the peculiar provisions of that act. It not only makes void the alienation of land for the benefit of charitable uses (to any person), but forbids land from being in any way charged or incumbered.

Under such an enactment, it has been very properly held that lands could not be devised to be sold for the benefit of a charity. Such a devise would effectually charge the land, and would be within the express words of the statute. It was remarked by the Lord Chancellor, in *The Attorney-General v. Lord Weymouth* (Amb., 20), that it was of no consequence, under the mortmain act, whether the gift was of land or money arising out of the sale of land; for, said he, "it is just the same thing—the statute making void all charges and incumbrances on land for the benefit of a charity."

IV. The distinction between a devise of land and a power to sell for the benefit of another, in respect to the capacity of the donee to take, is well settled by authority. The cases of *Craig v. Leslie* (3 Wheat., 563), and *Anstice v. Brown* (6 Paige, 448), hold that, where land is devised or conveyed to be sold, and the proceeds paid to an alien, the trust is perfectly valid. It is true that, when these cases arose, a devise or conveyance to an alien was not absolutely void, as devises now are. But I think this makes no difference—the reasoning of the judges in the cases proceeding upon the effect of an equitable conversion, and upon the consideration that the policy of the law which forbids aliens from holding was not infringed upon by bequeathing money to them to be raised by the sale of land pursuant to a power. So in the present case. The policy and the language of the statute prohibits corporations from holding land by the title of devise; but they are free to take money or personal property by a testamentary gift. To me it seems perfectly consistent with the policy, as it certainly is with the language, of the statute, to hold that a testator may, by will, create a power to dispose of his land and pay the proceeds to a legatee.

I am in favor of a judgment which shall establish the principle I have stated, that is to say, which shall uphold the power as regards the two incorporated societies which are not authorized to take by devise.

SELDEN, LOTT, JAMES, MASON and HOYT, Js., concurred, except that LOTT, HOYT and JAMES, Js., expressed no opinion

and personal estate. It was attested at his request by three witnesses, but Mr. Hunt did not state to the witnesses the nature of the paper which he requested them to attest. The Surrogate made a decree admitting the will to probate, which, on appeal by one of the next of kin, was affirmed by the Supreme Court at general term in the first district, and an appeal was thereupon taken to this court.

William Moultrie, for the appellant.

David Dudley Field, for the respondent.

DENIO, J. One of the requisites to a valid will of real or personal property, according to the Revised Statutes, is, that the testator should, at the time of subscribing it, or at the time of acknowledging it, declare, in the presence of at least two attesting witnesses, that it is his last will and testament. (2 R. S., p. 63, § 40.) The will which the Surrogate of New York admitted to probate, by the order under review, was defectively executed in this particular—the only statement which the alleged testator made to the witnesses being that it was his signature and seal which was affixed to it. It was correctly assumed by the Surrogate in his opinion, and by the Supreme Court in pronouncing its judgment of affirmance, that the instrument could not be sustained as a will under the provisions of the Revised Statutes, but that, if it could be upheld at all, it must be as a will executed in another State, according to the law prevailing there; and, upon that view, it was established by both these tribunals as a valid testament. In point of fact the instrument was drawn, signed and attested at Charleston, in South Carolina, where such a declaration of the testator to the witnesses, as has been mentioned, is not required to constitute a valid execution of a will. Mr. Hunt, the alleged testator, resided at that time in Charleston; but, some time before his death, he removed to the city of New York, and he continued to reside in that city from that time until his death. The will was validly executed, according to the laws of South Carolina.

zen of this State, he can, within the sense of the law of comity, be said to have made his will in South Carolina. The paper which was signed at Charleston had no effect upon the testator's property while he remained in that State, or during his lifetime. It is of the essence of a will that, until the testator's death, it is ambulatory and revocable. No rights of property, or powers over property, were conferred upon any one by the execution of this instrument; nor were the estate, interest or rights of the testator in his property in any way abridged or qualified by that act. The transaction was, in its nature, inchoate and provisional. It prescribed the rules by which his succession should be governed, provided he did not change his determination in his lifetime. I think sufficient consideration was not given to this peculiarity of testamentary dispositions, in the view which the learned Surrogate took of the case. According to his opinion, a will, when signed and attested in conformity with the law of the testator's domicil, is a "consummate and perfect transaction." In one sense it is, no doubt, a finished affair; but I think it is no more consummate than a bond would be which the obligor had prepared for use by signing and sealing, but had kept in his own possession for future use. The cases, I concede, are not entirely parallel; for a will, if not revoked, takes effect by the death of the testator, which must inevitably happen at some time, without the performance of any other act on his part, or the will of any other party; while the uttering of a written obligation, intended to operate *inter vivos*, requires a further volition of the party to be bound, and the intervention of another party to accept a delivery, to give it vitality. But, until one or the other of these circumstances—namely, the death, in the case of a will, or the delivery, where the instrument is an obligation—occur, the instrument is of no legal significance. In the case of a will it requires the death of the party, and in that of a bond a delivery of the instrument, to indue it with any legal operation or effect. The existence of a will, duly executed and attested, at one period during a testator's lifetime, is a circumstance of no legal importance. He must die leaving

such a will, or the case is one of intestacy. (*Betts v. Jackson*, 6 Wend., 173-181.) The provisions of a will made before the enactment of the Revised Statutes, and in entire conformity with the law as it then existed, but which took effect by the death of the testator afterwards, were held to be annulled by certain enactments of these Statutes respecting future estates, notwithstanding the saving contained in the repealing act, to the effect that the repeal of any statutory provision shall not affect any act done, &c., previous to the time of the repeal. (*De Peyster v. Clendinning*, 8 Paige, 295; 2 R. S., p. 779, § 5; *Bishop v. Bishop*, 4 Hill, 138.) The Chancellor declared that the trusts and provisions of the will must depend upon the law as it was when it took effect by the death of the testator; and the Supreme Court affirmed that doctrine. There is no distinction, in principle, between general acts bearing upon testamentary provisions, like the statute of uses and trusts, and particular directions regarding the formalities to be observed in authenticating the instrument; and I do not doubt that all the wills executed under the former law, and which failed to conform to the new one, where the testator survived the enactment of the Revised Statutes, would have been avoided, but for the saving in the 70th section, by which the new statute was not to impair the validity of the execution of a will made before it took effect. (2 R. S., p. 68.) If, as has been suggested, a will was a consummated and perfect transaction before the death of a testator, no change in the law subsequently made would affect it—the rule being, that what has been validly done and perfected respecting private rights under an existing statute is not affected by a repeal of the law. (*Reg. v. The Inhabitants of Denton*, 14 Eng. L. Eq., 124, per Lord CAMPBELL, Ch. J.)

If then a will legally executed under a law of this State, would be avoided by a subsequent change made in the law, before the testator's death, which should require different or additional formalities, it would seem that we could not give effect to one duly made in a foreign state or country, but which failed to conform to the laws of this State, where, at the time

of its taking effect by the testator's death, he was no longer subject to the foreign law, but was fully under the influence of our own legal institutions. The question in each case is, whether there has been an act done and perfected under the law governing the transaction. If there has been, a subsequent change of residence would not impair the validity of the act. We should be bound to recognize it by the law of comity, just as we would recognize and give validity to a bond reserving eight per cent interest, executed in a State where that rate is allowed, or a transfer of property which was required to be under seal, but which had in fact been executed by adding a scroll to the signer's name in a State where that stood for a seal or the like. An act done in another State, in order to create rights which our courts ought to enforce on the ground of comity, must be of such a character that if done in this State, in conformity with our laws, it could not be constitutionally impaired by subsequent legislation. An executed transfer of property, real or personal, is a contract within the protection of the Constitution of the United States, and it creates rights of property which our own Constitution guarantees against legislative confiscation. Yet I presume no one would suppose that a law prescribing new qualifications to the right of devising or bequeathing real or personal property, or new regulations as to the manner of doing it, and making the law applicable in terms to all cases where wills had not already taken effect by the death of the testator, would be constitutionally objectionable.

I am of opinion that a will has never been considered, and that it is not by the law of this State, or the law of England, a perfected transaction, so as to create rights which the courts can recognize or enforce, until it has become operative by the death of the testator. As to all such acts which remain thus inchoate, they are in the nature of unexecuted intentions. The author of them may change his mind, or the State may determine that it is inexpedient to allow them to take effect, and require them to be done in another manner. If the law-making power may do this by an act operating upon wills

provided the testator was then domiciled in such country, though he may have afterwards changed his domicile, and have been at his death a domiciled resident of a country whose laws required different formalities. Upon an attentive examination of the cases which have been adjudged in the English and American courts, I do not find anything to countenance this doctrine; but much authority, of quite a different tendency. The result of the cases, I think, is, that the jurisdiction in which the instrument was signed and attested, is of no consequence, but that its validity must be determined according to the domicile of the testator at the time of his death. Thus, in *Grattan v. Appleton*. (3 Story's R., 755), the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge STORY stating the rule to be firmly established, that the law of the testator's domicile was to govern in relation to his personal property, though the will might have been executed in another state or country where a different rule prevailed. The Judge referred, approvingly, to *Desobats v. Berquier* (1 Bin., 336), decided as long ago as 1808. That was the case of a will executed in St. Domingo by a person domiciled there, and sought to be enforced in Pennsylvania, where the effects of the deceased were. It appeared not to have been executed according to the laws of St. Domingo, though it was conceded that it would have been a good will if executed by a citizen of Pennsylvania. The alleged will was held to be invalid. In the opinion delivered by Chief Justice TILGHMAN, the cases in the English ecclesiastical courts, and the authorities of the writers on the law of nations, were carefully examined. It was declared to be settled, that the succession to the personal estate of an intestate was to be regulated according to the law of the country in which he was a domiciliated inhabitant at the time of his death, and that the same rule prevailed with respect to last wills. I have referred to these cases from

executed in England, of a French nobleman who emigrated in 1792, and died in England in 1836. Sir HERBERT JENNER *Juri* states it to have been settled by the case of *Stanley v. Bernes*; that the law of the place of the domicile, and not the *lex loci rei sitæ* governed "the distribution of, and succession, to personal property in *testacy* or *intestacy*." The Reporters' note is, that the validity of a will "is to be determined by the law of the country where the deceased was domiciled *at his death*."

Nothing is more clear than that it is the law of the country where the deceased was domiciled at the time of his death, which is to regulate the succession of his personalty in the case of *intestacy*. Judge STORY says, that the universal doctrines were recognized by the common law, is, that the succession to personal property, *ab intestato*, is governed exclusively by the law of the actual domicile of the intestate at the time of his death. (Conf. Laws, § 481.) It would be plainly absurd to fix upon any prior domicile in another country. The one which attaches to him at the instant when the devolution of property takes place, is manifestly the only one which can have anything to do with the question. Sir RICHARD PEPPER ARDEN, Master of the Rolls, declared, in *Somerville v. Somerville*, that the rule was that the succession to the personal estate of an intestate was to be regulated by the law of the country in which he was domiciled at the time of his death, without any regard whatever to the place of nativity, or the place where his actual death happened, or the local situation of his effects. ✓

Now, if the legal rules which prevail in the country where the deceased was domiciled at his death, are those which are to be resorted to in case of an *intestacy*, it would seem reasonable that the laws of the same country ought to determine whether in a given case there is an *intestacy* or not, and such we have seen was the view of Chief Justice TILGHMAN. Sir LANCELOT SHADWELL, Vice-Chancellor, in *Price v. Dewhurst*, also expressed the same view. He said, "I apprehend that it is now clearly established by a great variety of cases which it is not necessary to go through in detail, that the rule of law is this: that

of his death, and not the law of his domicile at the time of his making his will and testament of personal property which is to govern." (§ 478.) He then quotes at length the language of John Voet to the same general effect. It must, however, be admitted that the examples put by that author, and quoted by Judge STORY, relate to testamentary capacity as determined by age, and to the legal ability of the legatees to take, and not to the form of executing the instrument. And the Surrogate has shown, by an extract from the same author, that a will executed in one country according to the solemnities there required, is not to be broken solely by a change of domicile to a place whose laws demand other solemnities. Of the other jurists quoted by the Surrogate, several of them lay down rules diametrically opposite to those which confessedly prevail in this country and in England. Thus, Tollier, a writer on the civil law of France, declares that the form of testaments does not depend upon the law of the domicile of the testator, but upon the place where the instrument is in fact executed; and Felix, Malin and Pothier are quoted as laying down the same principle. But nothing is more clear, upon the English and American cases, than that the place of executing the will, if it is different from the testator's domicile, has nothing to do with determining the proper form of executing and attesting. In the case referred to from Story's Reports, the will was executed in Boston, but was held to be invalid because it was not attested as required by a provincial statute of New Brunswick, which was the place of the testator's domicile. If the present appeal was to be determined according to the civil law, I should desire to examine the authorities more fully than I have been able to do; but considering it to depend upon the law as administered in the English and American courts, and that according to the judgment of these tribunals it is the law of the domicile of the testator at the time of his death that is to govern, and not that of the place where the paper happened to be signed and attested, where that is different from his domicile at the time of his decease, I cannot doubt that the Surrogate and Supreme Court fell into an error in establishing the will.

for. Such wills are perfectly valid as to personal assets in this State, as was shown in *Parsons v. Lyman*. We recognize the foreign will, according to the comity of nations, just as we do the rules of distribution and of inheritance of another country when operating upon a domiciled citizen of such country who has died there, leaving assets in this State. Then, as to the proof of such wills, the section following those just mentioned provides for the case in these words: "Wills of personal estate, duly executed by persons residing out of this State, according to the laws of the state or country in which the same were made, may be proved under a commission to be issued by the Chancellor, and when so proved may be established and transmitted to the Surrogate having jurisdiction," &c. (§ 68.) The remainder of the section provides for the case of such a foreign will which has been proved in the foreign jurisdiction. Letters testamentary are to be issued in such cases upon the production of an authenticated copy of the will. It is clearly enough implied, perhaps, by the language of this section, that the will, to be proved and established under its provisions, and which is allowed to be executed, as to assets in this State, must be a legal will according to the law of the testator's domicile in which it was executed; but, for abundant caution, a section is added to the effect that "no will of personal estate, made out of this State, by a person not being a citizen of this State, shall be admitted to probate under either of the preceding provisions unless such will shall have been executed according to the laws of the state or country in which the same was made." (§ 69.) Chancellor WALWORTH appears to have understood the words, "a citizen of this State," as used in this section, to refer to political allegiance; and, "in the matter of Roberts' will," he held that the will then in question, executed in the island of Cuba, and which had been proved under a commission, and had been shown to be executed according to the laws of Spain, was a legal will, though the testator was a resident of this State at the time of his death. But he put the decision on the ground that the testator was a foreigner, and not a citizen, though domiciled here, and upon a verbal con-

hibits all other foreign wills from being admitted to probate, under the special provisions incorporated into the statutes of April, 1830." The words, "a person not domiciled here," are used in the paraphrase as the equivalent of "a person not being a citizen of this State;" and I think that rendering is perfectly correct. The provisions of the act do not, in my opinion, suggest any distinction between the place where a will is actually signed and attested and that in which it takes effect by the death of the testator. They are intended to provide simply for the case of the will of a person domiciled out of the State which it is desired to prove here; and the statutory mandate is, in effect, that it shall not be established here unless it was executed according to the requirements of the foreign law.

The will under immediate consideration was not, we think, legally executed; and the determination of the Surrogate and of the Supreme Court, which gave it effect, must be reversed.

COMSTOCK, Ch. J., LOTT, JAMES, and HOYT, Js., concurred.

DAVIES, J. (Dissenting.) Benjamin F. Hunt, Senior, a citizen of and domiciled in the State of South Carolina, made and executed in that State, on the 14th of August, 1849, his last will and testament, according to the forms and solemnities required by the laws of that State.

The testator changed his domicile, in the winter of the year 1854, to the State of New York, and died in the city of New York in the fall of that year. His will, thus executed in the State of South Carolina, was presented for probate to the Surrogate of the county of New York, who granted letters thereon, as a will of personal estate. From that judgment an appeal was taken to the Supreme Court, which affirmed the decision of the Surrogate; and from this latter judgment an appeal has been taken to this court. The question for our decision is one of novelty and of grave importance. It is somewhat surprising that it has never been presented, in the precise form in which it now arises, for adjudication in our courts. Similar cases must have arisen; and it cannot be doubted that, here-

after, as the number of States shall increase, each having its own forms and solemnities for the execution of wills, and differing from each other, as most of them do, the attention of the courts will be invoked to an investigation of the principles which should govern in the probate of wills, executed according to the forms of one locality and sought to be established in another having different forms. The precise question presented for decision in this case is, whether a will of personal estate, duly executed in conformity to the laws of the State where it was made, and in which the testator was domiciled at the time of its execution, is revoked, or rendered invalid, by a change of domicile into another State, where different forms and solemnities are required for its valid execution. This subject has received from the learned Surrogate in this case a most elaborate and careful examination, and it is difficult to add anything to the able and conclusive reasoning employed by him. The review of the principles applicable to the question, and of the authorities bearing upon it, is exhaustive and unanswerable. What is already made plain and satisfactory, can hardly be strengthened.

The rule is well settled that, to make a valid disposition of immovable property, or real estate, by deed, or by a last will and testament, the *lex loci rei sitæ* must govern, and the instruments must be executed in conformity to that law. So the capacity of the testator to make a will must depend upon the law of his domicile at the time of his death, and his condition at the happening of that event. (Story on Conflict of Laws, § 473, and authorities there cited.) Upon the question now under consideration, the authorities referred to by the Surrogate, from the writers on the civil law, have been collated by him with great research and care; and such of them as it has been convenient to examine, fully sustain the positions for which they are cited. Some of the civilians hold that, even as to real estate, the will is to be held valid everywhere, if executed according to the forms and solemnities of the place of its execution. Voet says, in reference to a similar case: "Thus, if a Hollander in Holland disposes by will of his real estate in

Utrecht, it ought to have effect as his will, because he observed the requirements of the law of the place in which the act of making the will was performed. Nor will it be weakened if, after his last testament has thus been made, in Holland, he may remove to Utrecht; for when the testament found in Holland is there executed according to the Holland customs it remains valid, even after his return to his own country; for, if there be no other objection, it would be unjust that, solely by the migration to a place requiring different legal forms, an act, before valid according to law in the place of the former domicile, should be void or broken." (Lib. 28, tit. 1, § 27.) Van Leeuwen, in his Commentaries on the Roman Dutch Law, and which were translated into English in 1820, expressly for the benefit of the English judiciary in the island of Ceylon (1 Kent's Com., 515), has this passage: "Hence this question has arisen, whether a will, made according to the practice required at the place where it is effected, as in Holland for instance, having been duly confirmed before a notary and two witnesses, ought likewise to take effect in other places where other and more numerous solemnities are required, as, in Friesland, where the number of witnesses required is seven. * * And, upon the general opinion of the Doctors, it was understood that a will, confirmed at a certain place according to the solemnities required there, takes effect everywhere, without distinction, because the solemnity required to the existence of anything belongs to the knowledge or jurisdiction of the government of that place where it ought to be observed; and if a person be obliged to follow the practice of different places, any person who lives, now at this and then at another place, would be obliged to make so many wills, or to observe different forms in one and the same will; and a will which is but a single act would be judged of according to different forms of law." (Com., 215.)

Du Moulin states the rule to be, "That it is the opinion of all lawyers, that whenever custom or local statute settles the form or solemnity of an act, even strangers performing that act are bound by it, and the thing done is valid and effectual

A careful consideration of the provision of the statutes of this State will satisfy the mind that the legislature were aware of the conflicting views entertained relative to wills executed in one state and offered for probate in another. The Revised Statutes, as amended in 1880 (Session Laws, p. 386), authorize the taking of the proof of wills, which shall have been executed according to the laws of this State, when the witnesses to the same reside without the jurisdiction of this State, by a commission to be issued out of the Court of Chancery. This provision is alike applicable to wills of real as personal estate; and if the legislature had not intended to make a different rule as applicable to wills of the latter description, no further legislative action was required. If it did not mean to permit wills of personal estate not executed according to the laws of this State, to be established as valid dispositions of property here, legislation would have stopped at this point. The subsequent provisions show, I think conclusively, that the legislature did intend that wills of personal estate, executed by persons residing out of the State at the time such wills were executed, if made in conformity to the laws of the State where executed, should be proved and established in like manner as wills of both real and personal estate, executed out of this State, according to the laws of this State. Section 68 (Laws of 1880, p. 389) provides, that wills of personal estate duly executed according to the laws of the state or country in which the same were made, by persons residing out of this State, may be proven and established in like manner as wills thus made and executed according to the laws of this State. The next section (69) is in its nature restrictive, for it declares that no will of personal estate, made out of this State by a person not being a citizen of this State, shall be admitted to probate under either of the preceding provisions, unless the will shall have been executed according to the laws of the state or country in which the same was made. It is here to be observed, that all these provisions of the statute have reference to the status or condition of the person making the will, at the time of its execution, and not to the period of the

cuted according to the laws of this State or according to the laws of the state or country where the same are made; while wills of personal estate, made by persons not citizens of this State, and executed without this State, can only be established here where the same shall have been executed in conformity with the laws of the State where made. A greater privilege is thus accorded to citizens of our own State, making wills of personal estate in other States, than to persons not citizens of this State. The reason for this may be, that the legislature assumed that our own citizens would carry with them a knowledge of the forms and solemnities touching the execution of wills prevailing in this State, and that it might well be optional with them whether they would adopt these forms, or those which obtained in the State where, and at the time, the will was executed. But no such presumption could arise in reference to citizens of other States, who might well be assumed to have no knowledge of the peculiar forms in relation to the execution of wills required by the local law of this State, or any means of access to the law prescribing those forms. It would be assumed that they knew the law of the State or place where the act was done; and, therefore, the legislature have determined that, as to them, a compliance with the *lex loci actus* is all that is required to give validity to the will in this State. A different rule would be fraught with the most serious inconveniences and hazards. Especially would this be so, in this country, where we have thirty-four independent States, or sovereignties, each having its peculiar laws on this subject, and requiring forms prescribed by its own legislation to give validity to wills sought to be established in its jurisdiction. It is also to be borne in mind that our citizens are constantly changing their domicile from one State to another, and that it is not infrequent for a person to have domicils in several States within the same year. Living, as we are, under one government, fraternally bound together as one people, and united by the most intimate social and business ties, these changes must be frequent and sudden. How grievous would be the hardship, therefore, to require a citizen who, upon

made, nor whether the will related to real or to personal estate. If to the former, the case was clearly decided in conformity with the universal rule that the *lex loci rei sitæ* is to control. It would be sufficient to say, if the will related solely to personal estate, that it does not appear that a statute similar to our own existed in Missouri. In *Desebats v. Berquier* (1 Binn., 336), the decedent was an inhabitant of St. Domingo, at the time of making the will, and at the time of his death; and the instrument, though sufficient in form to pass personal estate in Pennsylvania, was declared invalid. But it was not valid by the law of St. Domingo, and, therefore, conformed neither to the *lex loci actus* nor to the *lex domicilii*. Some of the English cases, as has been shown by the learned Surrogate, present the precise question which arises in this case; and the reasoning of the judges in the cases referred to shows that their opinions proceed upon principles inapplicable to our institutions and the habits of our people.

The case of Roberts' will, reported in 8 Paige, 446, and decided by the Chancellor in July, 1840, if the facts presented are carefully considered, will be found to be in harmony with the views already expressed. In that case the will was made by Roberts, in the Island of Cuba, in 1825. It was a will of personal estate, and executed according to the laws of that Island. Subsequently the decedent removed to this State and died here in 1837. He was a resident of this State at the time of his death. The will was not executed in conformity with the laws of this State, in force at the date of the will, or at the time of Roberts' death. The Chancellor having found that the will was duly executed according to the law of the testator's domicile at the time of its date and execution, made a decree establishing the instrument propounded, as a valid will of personal estate. I cannot but regard this case as an authority in point adverse to the views of the appellants, notwithstanding the remark made by the Chancellor, when he says that the provisions of our statutes relative to the execution of wills, do not apply to wills executed out of this State, by persons domiciled in the state or country where the will is made,

sion, holding that a will of personal estate duly executed according to the law of the testator's domicil, at the time of its date, and valid there, is not revoked by a change of domicil to another state or country where different forms are required. In this connection the provisions of our statute, on the subject of the revocation of wills, are not without significance. They are, that no will—that is a legal and valid will, as it is deemed it has been conclusively shown this was, at the time of the change of domicil—shall be revoked, otherwise than by some other will in writing, or other writing of the testator, executed with the same formalities with which the will itself was required by law to be executed. We have seen what those formalities were, when the will was executed in this State, and when made out of it, by a citizen of this State, and by persons not citizens. The Statutes also provide for a revocation in other modes therein enumerated. (2 R. S., § 42, p. 64.) Now it is not declared by the legislature that a change of domicil shall work a revocation of a valid will; and the principle of *expressio unius est exclusio alterius* may be applied here with great force and propriety. If the legislature had intended such should be the law—it is reasonable to infer—while legislating on the subject of revocation of wills, it would have so declared. This will, at the time it was made, was required by law to be executed in the precise form in which it was in fact executed, and it was then a complete and valid will; and the inquiry presents itself, how has it been revoked, and by what process has it lost its completeness and legal force?—Certainly by no act of the testator himself, directly tending to that result, or indicating any such intention; nor by any of the processes pointed out by our Revised Statutes, to effectuate such a purpose. Such revocation is sought to be maintained from the sole circumstance of a change of domicil to a State where different forms are required for the valid execution of a will, but upon whose statute books it is declared that wills of personal estate, if executed out of this State according to the laws of the place where executed, shall be valid, and that the same shall not be deemed revoked

borders as distinct communities, not embraced within the administrative arrangement of towns and counties, though resident within their bounds. But such lands were taxable when the Indian tribes, although actually occupying the Buffalo reservation, were so doing under a treaty which had extinguished their ownership, and provided for their removal beyond the Mississippi within the period at which the purchaser at a tax sale would be entitled to possession.

Lands thus occupied were properly assessed as non-resident lands. The possession which, under the Revised Statutes, would justify their assessment to the occupant, where the owner resided in another town, must be the possession of persons themselves liable to taxation.

The entire Buffalo reservation having been returned for the non-payment of taxes, and the several lots into which it was divided having been subsequently returned for the non-payment of other taxes, the Comptroller was authorized to apportion the taxes upon the whole tract, or portions of it which had been assessed in gross, among the several lots in proportion to their area, treating them as equally valuable in proportion to quantity; and his sale of the several lots for the taxes as thus apportioned was regular and valid.

APPEAL from the Supreme Court. The plaintiffs claiming that certain lands in the Indian reservations within this State, to which they had become entitled, had been illegally assessed and sold for the non-payment of taxes, united with the Comptroller as representing the State, and with the assignee of the purchaser at the tax-sales, in a statement of facts which they submitted without action under section 372 of the Code of Procedure. The case thus made is sufficiently stated in the following opinion. The Supreme Court, at general term in the third district, denied any relief to the plaintiffs, and from that judgment they appealed to this court.

John H. Reynolds, for the appellants.

John K. Porter, for the respondents.

DENIO, J. The present appeal is from the judgment of the Supreme Court, at general term, upon a case agreed upon by the parties, pursuant to the 372d section of the Code of Procedure. The controversy relates to the assessment of certain taxes upon lands comprised in Indian reservations in the counties of Erie and Cattaraugus, alleged to be illegal, and to sales

1838, the three reservations which have been mentioned, and also the Tonawanda reservation, lying in Erie and Genesee counties, were in the actual possession of this Indian tribe; and I can see no reason to question that these Indians were the owners of the land embraced in the reservations, as fully as it is possible for the native tribes to own lands in this State. The nature of the aboriginal title, and that of the State in which the lands lie, has been so often defined by judicial determination that no time need now be spent upon it. (*Johnson v. McIntosh*, 8 Wheat., 543; *Fellows v. Ellsworth*, 6 Hill, 546; *S. C.*, 5 Denio, 528.) The Indian nation, in a collective or national capacity, has the right of occupancy of the land, but no power to sell or in any way dispose of it to others, except to the State, or to persons authorized by it to purchase; and the government of the State has the ultimate right of soil, or title in fee simple, subject to the Indian right of occupancy. The right to purchase the Indian claim, or, in the language usually employed, to extinguish the Indian title, thus existing in the State or in its grantees, is usually called the right of preëmption. This right of preëmption, as to these reservations, resided in the State of New York, in the year 1786; but the State of Massachusetts set up a claim, to the effect that the western part of this State, including the reservations in question, was covered by the charter of that Colony, which, it was insisted, extended its territory quite across the continent to the Pacific ocean. The parties were proceeding to litigate this question before the Congress of the Confederation, when a compromise was entered into, under the authority of the legislatures of the respective States, by which the State of Massachusetts was to relinquish all pretension to political jurisdiction, and New York was to convey to the State of Massachusetts all its proprietary interest in the land. This arrangement was formally executed by an instrument called a compact, dated December 16th, 1786, signed by commissioners appointed by the respective parties, and confirmed and ratified by the legislatures of both States. The words of conveyance on the part of this State are as follows: "The State of New York doth

the laws of New York, while the lands shall remain the property of the State of Massachusetts; and it is quite clear that the provision, in that aspect of it, became inoperative immediately upon the sale and conveyance to Morris; but it is earnestly insisted that the imposing of the taxes in question constitutes a breach of the last branch of the covenant, which forbids the levying of "a general or State tax" upon such of these lands as should be granted by the State of Massachusetts, until after fifteen years had elapsed from the time such grants had been confirmed by the legislature. If a tax of the character mentioned, that is, a general tax, had been laid, a question would arise whether the grants spoken of embraced such grants as might be made by Massachusetts of the pre-emption rights which had been granted by New York, or whether grants which should carry with them a title to the actual occupation, and a lapse of fifteen years after their confirmation, were not required before a right to levy such a tax would accrue, according to the true construction of the agreement. We do not think it necessary to decide this question; for we are of opinion that none of the taxes under consideration come within the denomination of general or State taxes, according to the meaning of these terms in the instrument. Unless the taxes assessed under the act of 1841 are within the prohibition, it is not contended that any of the others are. It is argued that the distinction established by the agreement is between such public burdens as are ordinarily imposed by the standing laws of the State for town and county purposes, on the one hand, and extraordinary levies authorized under special acts of the legislature for peculiar and exceptional objects, on the other. The act of 1841, it is argued, is of the latter character; and it is claimed that the tax which it authorizes falls within the denomination of a State tax, rather than of a town or county charge or tax. But we are of the opinion that the true distinction is between taxes imposed for local purposes, as for objects which are usually provided for by town and county charges, and such taxes as are laid for the benefit of the whole State, and are levied upon all the property of the State alike. Tested

the new settlements. We must, therefore, hold that this particular objection to the tax in question cannot be sustained.

It is further argued that a law for taxing these reservations is inconsistent with the public guaranty contained in several treaties between the government of the United States and the Indian tribes, under which the latter retain the possession of the reservations. There are several treaties by which the Seneca nation of Indians are recognized as the lawful possessors of the lands embraced in these reservations. It will be sufficient to notice the one concluded at Canandaigua, on the 11th November, 1794. (U. S. Stat. at Large, vol. 7, p. 45.) It describes the lands of the Seneca nation by definite boundaries, which include all these reservations; and the United States, in express terms, acknowledge the land within these boundaries to be the property of the Seneca nation, and agree never to claim the same, or to disturb the said nation in the free use and enjoyment thereof. This, like all the other public treaties entered into by the United States, is parcel of the paramount law, and must prevail over all State laws in conflict with it. The guaranty of quiet enjoyment is not limited to disturbances by the United States government, but extends equally to the acts of the several States and of all the citizens of the Union. This results from the nature of the treaty-making power, and from the paramount authority which the Constitution attributes to Federal treaties when it declares them to be the supreme law of the land. A treaty concluded by the President and Senate binds the nation in the aggregate, and all its subordinate authorities, and its citizens as individuals, to the observance of the stipulations contained in it. The principle has been asserted and established by repeated decisions of the Supreme Court of the United States. (*Ware v. Hilton*, 3 Dall., 199; *Worcester v. The State of Georgia*, 6 Pet., 515.) This State was, therefore, precluded from passing any law which should disappoint or frustrate the guaranty afforded to the Seneca Indians by the treaty to which I have referred. Any act of the legislature, the execution of which would dispossess the Indians of the reservations, or any part of them, or which

State; but certain sections apply to the lands of any Indian tribe with which the United States have treaties. By these provisions it is forbidden to any person to settle upon or to survey or allot any of the Indian lands referred to, or to acquire their title by grant or otherwise, without the authority of the United States. (§§ 11, 12.) It is quite plain that a purchaser under a sale for the non-payment of taxes, under the act of 1841, would not acquire the authority of this State to do any of the acts thus forbidden by the act of Congress.

It will now become necessary to state some circumstances, not already mentioned, upon which other parts of the relief claimed depend. There was an act of the legislature, passed in 1840 (ch. 254), authorizing the respective Boards of Supervisors of Allegany, Erie, Chautauqua and Cattaraugus to assess the lands included in the Indian reservations within their districts for such sums as they should consider reasonable to put the highways and bridges in said reservation in repair; the burdens thus imposed to be in proportion to those laid on other lands of equal value in the same towns. The amount raised was, as I understand the act, to be apportioned among the overseers and commissioners of highways of the towns according to the discretion of the Supervisors. In other respects, the Revised Statutes respecting highways and bridges were to apply to the assessment of these taxes and the expending of the moneys raised. Under this act, assessments were made in Cattaraugus county upon certain large parcels of land in the Allegany and in the Cattaraugus reservations, and taxes imposed thereon for the repairs of highways: the method apparently being to assess for the benefit of each town in which any part of the reservation was situated, the portion of the reservation lying therein in gross. These assessments were made in the same years mentioned in the act of 1841, or in some of these years; the course varying in this respect in the different towns. In the same years, or in some of them, the same parcels of these two reservations were assessed for town and county charges in several of the towns in the county of Cattaraugus. These last mentioned assessments appear to have been made in the ordinary

of the Indians, the inevitable consequence of holding the taxes to be valid would be that the whole tribe might be dispossessed by the purchaser at the Comptroller's sale. The reasoning upon which it has been shown that the sale actually made was void, equally proves that these taxes were illegally imposed. Such taxes were inconsistent with the policy which this State has always observed towards the Indian tribes residing on their reservations within this State. Each of the three Constitutions successively adopted by the people of the State has contained a provision like that in the first Constitution, which was in these words: "No contracts or purchases for the sale of lands made since the 14th day of October, A. D. 1775, or which may be hereafter made with or of said Indians, within the limits of this State, shall be binding on the said Indians, or be deemed valid, unless made under the authority and with the consent of the legislature of this State." (Const. of 1777, art. 37; id., 1822, art. 7, § 12; id., 1846, art. 1, § 16.) This alone would go far to show that their lands were not to be subjected to the burdens imposed upon the lands of citizens, for, without ability to sell, it might often happen that it would be impossible for them to raise the money necessary to pay their taxes. It would be quite inconsistent with principle to allow all the lands of these people to be taken from them and sold to strangers, under the silent operation of general laws, while the sanction of the legislature, passing upon the actual transaction, is required to a valid alienation of the smallest parcel. In accordance with this constitutional inhibition, there are laws for the prevention of intrusions upon Indian lands, and to prevent trespasses upon them, all of which indicate a persistent intention to separate the Indian tribes from the other population of the State, and to allow them to govern themselves according to laws and usages of their own. Chancellor KENT expressed the view which our laws take of their position, in giving his opinion in *Goodell v. Jackson* (20 John., 693). "In my view of the subject," he said, "they have never been regarded as citizens or members of our body politic, within the contemplation of the Constitution. They have always been and are still considered by our

of New York Indians, including, of course, the Senecas. The substance of the treaty was, that the United States should provide lands for these Indians in the Indian territory on the Mississippi river, and that they should remove thither in five years. At the same time, Messrs. Ogden & Fellows, who held the title to the four reservations under the grant executed by the State of Massachusetts, treated with the Senecas for the purchase of their title to these reservations, and received a conveyance of them from their chiefs and head-men. The deed was expressed to be in consideration of \$202,000 paid, and was absolute in its terms. It was approved by a commissioner of the United States, who negotiated the principal treaty, and by a superintendent on the part of the State of Massachusetts. This conveyance was appended to the principal treaty, and was recognized by its tenth article, by which the United States agreed to receive the consideration mentioned in it as the trustees for the Indians and dispose of it for their benefit in the manner therein mentioned. On the 20th May, 1842, another treaty was concluded between the United States and the Seneca nation, approving of a new arrangement between the Indians and Ogden & Fellows; which new contract was embraced in a written instrument executed at the same time between them and embodied in the treaty. It recited the conveyance of 1838, and that differences had arisen between the parties respecting it, and that its provisions remained unexecuted. It was thereupon agreed that the Indians should retain their rights in the Allegany and Cattaraugus reservations; but they again granted and confirmed to Ogden & Fellows the Buffalo creek and Tonawanda reservations, the aggregate consideration to be paid them being reduced, and to be determined as to certain particulars by arbitrators. By the terms of this treaty, the United States consented to the new arrangement, and agreed to receive and apply the moneys according to certain provisions contained in the indenture; and the State of Massachusetts also approved the treaty, and confirmed the conveyance according to the provisions of the compact. The award of the arbitrators respecting the consideration to be paid for the two reserva-

tainly much more than enough to show that the Allegany and Cattaraugus tracts had not ceased to be Indian reservations when, in 1842, and before there had been any change of possession, the purchase of the Indian title was rescinded by a treaty negotiated under the authority of the United States. This concludes all that it seems essential to say respecting these two tracts.

It is not necessary to add anything respecting the taxes imposed upon the Buffalo creek reservation, under the act of 1841. Having held such taxes to be legal, as to the tracts to which the Indian title has not been extinguished to this day, it follows, *a fortiori*, that they are unexceptionable as to the tract now in question, which had been conveyed by the Indians when the taxes were laid, and has since come into the full possession of the grantees.

The taxes for highways and for town and county charges, upon this reservation, under the general statutes, and under the act of 1840, require a different consideration. When they were laid, the Indian tribe was occupying the land, though they had conveyed it. There is great plausibility in the argument that, inasmuch as this occupancy has been held to be of such a character as that the laws against intrusions upon Indian lands continued to apply, it would be inconsistent not to consider the treaties by which the Indian occupancy was guaranteed also applicable. If the occupancy was lawful, and the Indians were entitled to the protection of the State laws against intrusions upon the reservation by white people, how, it may be said, can they be turned out, by force of a tax sale, consistently with the principles which we have applied to the other reservations? The answer is this: Though the Indian occupancy was lawful at the time the taxes were assessed, yet it was under a title not implying ownership, but only temporary in its character, and which could not, in contemplation of law, continue beyond the time when the Indians had agreed to remove west. This period would be reached in about three years from the time the first tax was assessed, and before any purchaser at a sale for non-payment

the Indians remained upon it for a temporary purpose, preparatory to their removal west.

The remaining question is, whether the sale by the Comptroller of the land in this reservation was regularly made.

It appears that at some time, not stated, the Buffalo creek reservation was surveyed and divided into four hundred and ninety-three lots. It seems probable that this was done after the treaty of 1838, and prior to the assessments of 1842; for that is the first year in which there is any reference to lots in any of the assessments. The assessment of the \$5,000 for the three years mentioned is upon the whole reservation. The assessments for town and county charges are, for the most part, upon those parcels of the tract lying respectively in the several towns for which the assessments were made; though, in some instances, the lots are separately assessed. In the year 1844, and subsequently, taxes were regularly assessed on many of the lots separately. Returns having been made to the Comptroller in respect to all these taxes, he proceeded to advertise the lands for sale in the year 1859, as four hundred and ninety-three separate lots in a certain survey. Before the sale he had apportioned the taxes on each of the lots, and entered the same in his books. This seems to have been done whenever the whole reservation, or portions of it, other than separate lots, had been assessed in gross, by averaging the burden according to the quantity of land in each lot. At the sale, each lot was put up for the aggregate amount with which it was thus made chargeable, including the cases in which there had been distinct assessments on each lot, and including also the taxes assessed subsequently to 1843. The greater part of the lots were, for default of other bidders, struck off to the State, and nearly all the purchases have been assigned to Thomas W. Olcott. The alleged illegality consists in apportioning the taxes among the lots in the manner which has been mentioned, the appellants insisting that the sale should have taken place according to the parcels specified in the several assessments, without any apportionment.

unjust to resort to it in the case of a voluntary payment by a part owner of a parcel of land assessed in gross, it would be equally fair to make use of it when the land came to be sold. If the apportionment to the several lots could not be made in this case, it would be equally impossible to do it if it were shown that each lot had a separate owner. If there were no other way than to sell the tract in gross in such a case, it would inevitably happen that the whole of some of the lots would be sold to pay the incumbrance resting equally upon all, while the others would be left untouched, and would be discharged from the lien. We are of opinion, therefore, that the sale which was made of this reservation was valid.

The judgment of the Supreme Court, holding that the plaintiffs were not entitled to relief upon any part of the case, must be reversed, and judgment must be given in accordance with this opinion, without costs to either party in this court. Should the counsel fail to agree upon the language of the judgment to be entered, it will be settled by the judge by whom the opinion has been prepared.

All the judges concurring,

Judgment reversed.

28	439
119	294
28	439
121	81
23	439
173	223

STARIN v. THE TOWN OF GENOA.

GOULD v. THE TOWN OF STERLING.

The act (ch. 375 of 1852) authorizing any town of Cayuga to borrow money to aid in the construction of a railroad upon the written consent of two-thirds of the resident taxpayers, is constitutional and valid.

The act is not within the objection that it submits any legislative question to the town. All that is submitted is, whether it is expedient for the town to exercise a new power conferred upon it absolutely by the legislature.

in writing, executed as hereinafter stated. On the trial, the judge directed a verdict for the plaintiff.

These facts appeared: On the 16th of April, 1852, the legislature passed an act (Laws of 1852, ch. 875), the first section of which provides that it should be lawful for the supervisor of any town of Cayuga county, and the assessors of said town, who were appointed commissioners to act, in conjunction with the said supervisor, in effecting and executing the purposes of the act, to borrow, on the faith and credit of such town, such sum of money as they might deem necessary, not exceeding \$25,000, for a term not exceeding twenty years, at a rate of interest not exceeding seven per cent per annum, payable annually or semi-annually: and to execute therefor, under their official signatures, a bond or bonds for the payment of the principal and interest of such loan, in such sums and at such times and place as should be agreed upon and expressed in the bonds to be executed under the authority of the act. All the money borrowed under the act was to be paid over to the president and directors of such railroad company, then or thereafter to be organized under the general railroad law, as might be expressed by the written assent of two-thirds of the resident taxpayers of the town: to be expended by such railroad company in grading, constructing and maintaining a railroad or railroads passing through the city of Auburn and connecting Lake Ontario with the Susquehanna and Cayuga railroad or the New York and Erie railroad; but it was expressly provided that the supervisor and commissioners should have no power to do any of the acts authorized by said act until a railroad company had been duly organized, according to the requirements of the general railroad law, for the purpose of constructing the described railroad, and the written assent of two-thirds of the resident persons taxed in said town, as appearing on the assessment-roll of such town made next previous to the time such money should be borrowed, had been obtained by such supervisor and commissioners, or some one or more of them, and filed in the clerk's office of Cayuga county, together with the affidavit of such supervisor or com-

with interest at the rate of seven per cent, payable semi-annually, on the first day of January and July in each year. All of these bonds were, on the eleventh day of October, 1853, delivered by the said Ashbel Avery, who then was one of the railroad commissioners of the town, with the knowledge of, and without any objection by, the other commissioner, to the Lake Ontario, Auburn and New York Railroad Company (a company organized under the general railroad law on the 23d day of August, 1852, for the purpose of constructing the railroad referred to in the said act), in payment for capital stock in said company, to the amount of such bonds, subscribed for in the name of said town; upon an agreement, however, that the company might, at any time within eight months, deliver the bonds, or any of them, to the said town or the railroad commissioners, and reduce the amount of such stock accordingly; and that the town might, within the same time, and prior to the sale of the bonds by the company, have the right to demand a re-delivery of them upon payment of the par value thereof; and, if the company should sell the bonds for more than par, they were to "allow the same for the amount of the premium." The stock was still held by the town when this action was commenced, and, according to an averment in the complaint, was paid for wholly by the delivery of such bonds, and not otherwise. An affidavit, dated on the eleventh and sworn to on the twenty-ninth day of September, 1852, by the supervisor and assessors of the said town, was filed on the thirtieth day of the same month with the clerk of Cayuga county, in which it was stated "that the several persons whose written assents are hereto attached comprise two-thirds of all the resident taxpayers of said town of Genoa on its assessment-roll made and completed next previous to the date thereof." These assents purport to be signed by resident taxpayers of that town, and by their terms authorize the said supervisor and assessors to borrow \$25,000 on bonds to be executed under their official signatures, as provided for in the said act, and to pay the moneys so borrowed to "the president and directors of a railroad company organized" for the purpose of

Gould v. The Town of Sterling was an appeal from the Supreme Court, argued at the same term with the preceding. The action was founded upon a written promise, not under seal, in all respects similar as to its form, consideration and the manner in which it was issued and came to the hands of the plaintiff to the so-called bonds described in the case of the town of Genoa, last preceding. The trial was before a referee, and the evidence established the same state of facts as in the preceding case with these exceptions. The bonds (as they will be denominated, for brevity), purported upon their face to have been issued under "An act to authorize the town of Sterling, in the county of Cayuga, to borrow money and to tax the town for the payment of the same," passed June 23, 1851 (Sess. Laws, p. 544). By this act the supervisor of the town of Sterling, and Robert Hume and William Wyman, as commissioners, were authorized to borrow \$25,000 on the credit of the town, and to execute therefor a bond or bonds with interest not exceeding seven per cent per annum, payable on the first day of March of each year, and for three successive years after the first day of March, 1852. There was the same provision as to the disposition of the money to be borrowed as in the case of the town of Genoa, and the assent required as a condition precedent to the power of the supervisor and commissioners to do any of the acts authorized was that of "two-thirds of the resident persons taxed in said town as appearing on the last assessment-roll," to be obtained and filed in the clerk's office of Cayuga county. The act further provided that the Board of Supervisors of Cayuga county should "at their annual meeting in each of the years one thousand eight hundred and fifty-one and for three successive years," cause to be levied and collected from the town of Sterling a sum equal to the interest of the bonds.

It was claimed in the complaint that the bonds in suit were made under the act of 1851 as amended by an act of July 21, 1853 (Sess. Laws, ch. 605, p. 1137), which makes it lawful for the supervisor and railroad commissioners of the town to issue the bond provided for by the former act "with provisions and

The power to borrow money and to subscribe for railroad stock was not one of the general powers possessed by towns, and the object of the act in question was to give it, upon certain terms and conditions prescribed. It was, in other words, a qualified and limited power; the same in principle as is conferred on a corporation to be exercised by and with the assent of its stockholders, or a portion of them, or upon an individual, with the previous approval of an officer of the court. It was not like the free school act, declared by this court to be unconstitutional in *Barto v. Himrod* (4 Seld., 483). The legislature, instead of declaring that to be a law, submitted it to the people of the whole State to determine, by a majority of the votes cast, whether it should or should not become a law. It was said by RUGGLES, Ch. J., in his opinion in that case, "In substance and reality the legislature propose the law. The people pass or reject it by a general vote. This is legislation by the people" (p. 488). He says further, after referring to the provisions vesting the legislative power in this State in the senate and assembly, that "the legislature had no power to make such submission" (p. 489), and WILLARD, J., in the same case, after taking substantially the same view of the question, says that "it is not denied that a law may be passed to take effect on the happening of a future event" (p. 495), and, after citing several examples, he adds, "The future event gives no additional efficacy to the law, but furnishes the occasion for the exercise of the power." * * "The law is complete when it has been passed through the forms prescribed by the Constitution, though its influence may not be felt until a subject has arisen upon which it can act" (p. 496).

In the case under consideration, the act, as before stated, by its terms took effect immediately; but parties to be affected by it were at liberty to accept the privileges granted, and incur the burdens and obligations it would impose as their interest or will should dictate: and any one or more of the towns, referred to therein, could take the benefit of it, and make it effective as to themselves, irrespective of the election or will of the others. It was therefore in all its material characteristics

The principle decided in that case, and the considerations above suggested, lead us to the conclusion that the law in question is valid.

2d. The next, and an important, question presented is, whether it was incumbent on the plaintiff to show affirmatively that the assent of the taxpayers, required to be obtained by the said act, had in fact been obtained.

The towns of this State, as before remarked, have not the general power to borrow money, nor are their officers, in the exercise of their ordinary duties, authorized to issue bonds or any other evidence of indebtedness, in the name of the towns represented by them, for loans or other debts contracted or incurred on their behalf. Such power must therefore be specially conferred by a grant from the legislature; and there is no doubt that the grant may be made, upon such terms and under such limitations, restrictions and conditions as may be deemed necessary and proper for the protection of the taxpayers who are to pay the debt, on the one hand, and for the security of the lenders and creditors, on the other. The power may, therefore, be either general or qualified or special. That conferred in this case was of the latter character. The act expressly declares that the officers vested with the authority of borrowing the money on the faith and credit of their town, and performing the other acts therein specified, should "have *no power to do any of the acts*" authorized by the law until a railroad company had been organized for the purpose of constructing the railroad designated therein, and such written assent had been obtained, and, together with an affidavit of the character specified in the first section of the act, had been filed as is directed by that section. The legislature have thus seen fit to declare, in addition to other requirements and conditions imposed by the law, that taxpayers of the towns included within its operation should not be charged with the burden of the debt contemplated, except with the written assent of two-thirds of the resident persons taxed in said towns appearing on the assessment-roll thereof made next previous to the time such money was borrowed. Such assent was to be obtained by

by them. The ordinary proof, to establish that, was the evidence of a witness to the signature, or of some person acquainted with it and able to express a belief that it was genuine; but it was competent for the legislature to provide that an affidavit or any other proof should be sufficient. That has not been done in the case before us. It is important here to observe, that the affidavit necessary to be filed is required to be made by the supervisor or commissioners, or any two of them, charged with the duty of obtaining the requisite assents, while it is provided that such assent might be obtained by some one or more of them. It may be (and as it appears there were three several papers, purporting to be such assents, it probably was the fact) that the signatures, or most of them, were procured through the separate agency of those officers, but it is not reasonable to assume that all were so procured by the supervisor. The person who did act and perform the duty would be able to prove the actual subscription of the signature, and it is not at all probable that the others, or either of them, were sufficiently acquainted with the handwriting to prove its genuineness. It was, however, competent for all of them, after an examination of the proper assessment-roll, to swear that the persons, whose names purported to be subscribed to those assents, comprised two-thirds of all the resident taxpayers on it, and that, in my opinion, was all that was intended to be proved by that affidavit. This construction is reasonable and consistent with the general design and intention of the act. Such an affidavit would relate to a matter merely of computation, and when the verity of it was to be established by the oath of two individuals, reasonable proof, in that respect, was secured; but the fact of such assent was to be ascertained and proved like any other fact, of which the evidence was manifested in writing. The affidavit in question does not, in terms, state, and I do not think the statement therein made, "that the several persons whose written assents are hereto attached" can be construed to mean, that those persons subscribed such assents. It was sworn to by four different individuals, and it is not, in my opinion, to be credited that all

aggregate number of votes taken, designating how many were for and how many against taking railroad stock" (§ 9), and that "the president and trustees shall, within two days after the return of said trustees to the clerk, meet and proceed to canvass the votes thus certified and returned, and shall make out and file in the office of the clerk of Oneida county the certificate setting forth that this act is approved or not approved, as the case may be; and if it shall *appear from such certificate* that this act has been approved and the issue of stock authorized, the president and trustees of said village shall proceed to make subscription and to issue bonds as authorized by this act" (§ 10.) It will be seen from these provisions of that act above referred to, that the power to subscribe for the stock and issue the bonds, was to become operative and effectual on the approval of the act by the electors of the village; and that the certificate of such approval, duly filed in the office of the clerk of the county of Oneida, was declared to be evidence of that fact and fully authorized such subscription and the issue of bonds therefor. Those bonds were directed to be placed under the entire control and management of five individuals called "Commissioners of the Railroad Fund of Rome," who were vested with the power of "entire control and negotiation of said bonds" upon certain terms and restrictions; and it was conceded in that case that the bonds had been legally issued to such commissioners, and the question there discussed and decided arose upon their disposition thereof. The decision made therein therefore does not conflict with the views above expressed, but is entirely consistent therewith.

3d. As the requisite assent to borrow money and do the other acts authorized by the law in question may be shown on a new trial, it may be proper to consider and determine now, whether (conceding such assent to have been given) the power has in fact been executed so as to create a liability on the part of the defendant. The power conferred was limited to the performance of certain acts, and was to be executed by the supervisor and the assessors of the town. The object was to extend aid towards the construction of a railroad or railroads running

their bonds, for the purpose of sale, from which much less than the amount for which they were given might be realized. If it had been intended to authorize bonds to be given for stock, there is no reason why that intention should not have been declared, as was done in the law in relation to the village of Rome above referred to. The statute, under any aspect of it, confers extraordinary powers, by which heavy burdens, for the term of twenty years, may be imposed on one-third of the taxable inhabitants against their will for an enterprise which they may deem injudicious and inexpedient; and indeed actually prejudicial to the welfare of their town. It therefore should receive such construction as its language and terms clearly call for; and the powers granted should not be extended by implication, or on the idea that the same end may be attained in a different manner. There is no ambiguity in the language of the act by which the power in question is granted, and it is unquestionable that the bonds issued were not given for money borrowed, the purpose for which, and for which only, they could be used. They were therefore clearly issued without authority and as the railroad company received them on a consideration not authorized, it was chargeable with a knowledge of their invalidity, and they never could have enforced them. The plaintiff stands in no different or better position. He purchased those on which this action is brought directly from the company, with full notice of the facts and circumstances under which they had been received. He is therefore not a *bona fide* holder of them, and the rights of the parties are to be determined in the same manner and on the same principles as if the company was seeking to collect them.

These considerations lead us to the conclusion that the defendants are not liable to the plaintiff on these bonds, and that the judgment of the court below is consequently erroneous and must be reversed and a new trial ordered.

into effect, to borrow upon the credit of the town a sum not exceeding \$25,000, at a rate of interest not exceeding seven per cent, and to execute bonds "under their official signatures" therefor, upon which the interest should be "made payable on the first day of March in each year, and for three successive years after the first day of March, 1852."

Section four made it the duty of the board of supervisors of the county, in each of the years, 1851 and three following years, to levy and collect from the taxable inhabitants and property of the town, a sum equal to the interest upon the bonds; and in each of the years succeeding the said three years, to levy and collect in like manner, a sum over and above the interest, equal to the principal which would fall due, on or before the 1st of March thereafter. The bonds or obligations in question were not in fact issued until August, 1853, and were signed not by John M. McFadden, the supervisor of the town of Sterling for the year 1851, and by Robert Hume and William Wyman the commissioners named in the act, but by William Wasson, supervisor for the year 1853, and by Robert Hume and Isaac Turner, the commissioners elected for that year under section 10 of the act.

It is insisted by the defendant's counsel that the authority to act was given specifically to the supervisor for the year 1851, and to the commissioners named in the act, and that no other persons could exercise it: also that the persons whose assent was to be obtained, were those appearing upon the last assessment roll previous to the passing of the act; and that the power to levy and collect the sums necessary to pay the principal and interest of the bonds was confined to specific years, and could not be exercised at any other time.

There is no doubt that a statutory power of this kind must be strictly pursued; and were there no other authority for the issuing of the bonds in question, than the act of 1851, they would, in my opinion, be clearly void. An additional act, however, was passed in 1853 (Sess. Laws of 1853, ch. 605), by which it was provided, that it should be "lawful for the supervisor and railroad commissioners of the town of Sterling,

act. It is clearly not within its language. No money was borrowed, and nothing else was authorized by the terms of the act. If however what was done, was the same in effect, as if the money had been borrowed, and paid over to the railroad company, the difference in form would not be material. But it is plain that neither in respect to the railroad company nor the town was its effect the same. If the statute had been pursued, the company would have had a sum equal to the par value of the bonds, to expend upon their road. As it was, they were compelled to sell the bonds at a discount, in order to realize the money.

If they could sell at a discount at all, they could of course sell at any sacrifice however great. The bonds of the town of Sterling for \$25,000, might have been sold for \$10,000. Can it be supposed, that if such a power had been specifically asked of the legislature, the request would have been granted? Would the town have been permitted to raise by taxation upon its inhabitants \$25,000, for the sake of furnishing the railroad company with \$10,000, to be expended upon its works? I think not; and yet this is, in effect, the power which it is claimed was conferred by the act authorizing the town to borrow. The rate of discount, whether more or less, can make no difference with the principle.

Had the town itself made the sale, and paid over the avails to the railroad company, it seems to me entirely clear, that the transaction would have been illegal. It is usual for the legislature when conferring upon a municipal or other corporate body the power to raise money upon the faith and credit of the corporation, to guard against such a sacrifice. An example of this may be seen by referring to the act amending the charter of the city of Rochester, passed July 3, 1851. By section 12 of that act the common council were authorized to create a public stock not exceeding \$30,000, to be applied to the erection of a city hall; and for that purpose to issue bonds or certificates in the usual form. They were also authorized to sell and dispose of such bonds or certificates "upon such terms as they should (shall) deem most advantageous to

this case, not only a literal, but a substantial, difference between the course pursued and that pointed out by the statute. It follows that the bonds were illegally issued, and were, consequently, void in the hands of the railroad company; and, as the referee has expressly found that the plaintiff became the purchaser, with full knowledge that the bonds had not been issued for money borrowed, but in payment for the stock of the company, he is in no better situation than the railroad company itself.

There is another objection, which is equally fatal to the validity of the bonds. Section 1 of the act of 1851, after conferring upon the supervisor and railroad commissioners power to issue the bonds, concludes with a proviso to the effect that these officers should have no power to do any of the acts authorized by the statute until "the written assent of two-thirds of the resident persons taxed" in the town, as appearing upon the last assessment-roll, should have been obtained and filed in the clerk's office of Cayuga county.

Each of the bonds upon which the action was brought stated upon its face that the requisite assent had been obtained and filed, and to each was attached a certificate in the following words: "Cayuga County Clerk's Office, ss: I, Edwin B. Morgan, clerk of the county of Cayuga, hereby certify that a paper, purporting to be the written assent of two-thirds of the resident taxpayers of the town of Sterling, with the affidavit required by section 1 of the act referred to by its title in the foregoing bond, has been filed in this office."

The statute did not authorize the giving of any such certificate, nor did it provide for the filing of any affidavit, or prescribe in any manner the evidence by which the requisite assent should be established. The paper referred to in the certificate was also produced from the files of the clerk's office, with a number of names attached. This paper, together with the certificate, was read in evidence, under objection by the defendant's counsel. No evidence was given, or offered, of the genuineness of the signatures; nor that the subscribers were resident taxpayers of the town of Sterling; nor that the persons whose

The estoppel contended for is supposed to result from that rule of the law of principal and agent in accordance with which it is held that, where a power is conferred, if the agent does an act which is apparently within the terms of the power, the principal is bound by the representation of the agent as to the existence of any extrinsic facts essential to the proper exercise of the power, where such facts from their nature rest peculiarly within the knowledge of the agent. This is the doctrine asserted in the case of *Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank* (16 N. Y., 125). No representation of the agent as to the fact of his agency, or as to the extent of his power, is of any force to charge the principal. But, it being shown by other evidence that the agency existed, and that the act done was within the general scope of the power, the principal is bound by the representation of the agent as to any essential facts known to the agent, but which the party dealing with him had no certain means of ascertaining.

The reason upon which this rule is founded is that given by Lord HOLT, in *Hern v. Nichols* (1 Salk., 289), viz., that, where one of two innocent parties must suffer through the misconduct of another, it is reasonable that he who has employed the delinquent party, and thus held him out to the world as worthy of confidence, should be the loser. This reason can, of course, only apply to a case where the principal has himself employed the agent, and voluntarily conferred upon him power to do the act. This clearly is not such a case. The agents here were designated, not by the town, but by the legislature; and no power whatever was conferred by the town, unless the assent of the taxpayers was obtained. Any representation, therefore, by the supervisor and commissioners in respect to such assent would be a representation as to the very existence of their power. Such representations, as we have seen, are never binding upon the principal. It is obvious, therefore, that the doctrine of the case of *The Farmers' and Mechanics' Bank v. The Butchers' and Drovers' Bank* has no application to the present case.

There is an obvious distinction between this case and that of the *State of Illinois v. Delafield* (8 Paige, 527). There the State was the party to be bound, and the State had by law appointed certain officers its agents, and conferred upon them power to execute and negotiate its bonds. The difficulty consisted in the irregular manner in which the power was executed, not in the creation of the power itself. The distinction is as plain as that between conditions precedent and subsequent in general.

It follows from these principles, that until it was shown, that the written assent of the required number of taxpayers had been obtained pursuant to the act, there could be no recovery upon the bonds. The judgment of the Supreme Court must be reversed, and there must be a new trial, with costs to abide the event.

DAVIES, J., did not hear the argument in either case; all the other judges concurring,

Judgments reversed, and new trials ordered.

WHITFORD, Administrator, &c., v. THE PANAMA RAILROAD COMPANY.

28	465
148	26
28	465
e164	150
164	153

The statutes giving an action for damages resulting from a death caused by culpable negligence, do not apply where the injury is not committed in this State, but in a foreign country.

It does not vary the case that the negligence was that of a corporation chartered by this State for the purpose of operating a railroad in the foreign country, and which made the contract in this State for the conveyance of the injured party over such road.

These statutes, it seems, are not simply remedial, but create a new cause of action in favor of the personal representative of the deceased, which is wholly distinct from and not a revival of the cause of action which, if he had survived, he would have for his bodily injury.

Whether a person entitled to the services of another, as a parent to those of a child, may not maintain an action against one by whose negligence, resulting in death, he has been deprived of such services, reserved as an open question in this court.

who has lost the society and assistance of his wife, by acts of culpable negligence on the part of others, by means of which death has ensued, may not respectively maintain actions against the wrongdoer to recover damages for such an injury. Several of the cases in which that question has been discussed are referred to in *Green v. The Hudson River Railroad Company* (28 Barb., 9); and the opinion of the Supreme Court in that case itself examines the point with care and ability. The present action does not in any way involve that controversy, and, as the case just referred to is understood to be pending in this court on appeal, it is intended carefully to abstain from the expression of any opinion upon it. The plaintiff in the case before us does not occupy any other relation to the deceased than that of the administrator of his estate; and it has never been suggested, so far as I know, that the personal representatives of a deceased person could, at the common law, sustain an action on account of the wrongful act of another which caused the death of the person whose estate they represent. The plaintiff, accordingly, bases his claim solely upon the acts of 1847 and 1849. These acts do authorize a recovery for such a wrong, in a case in which the deceased, if he had survived, could himself have maintained an action for the injury; and the damages recovered are declared to be for the benefit of the widow and next of kin of the deceased. The averments of the complaint bring the case precisely within the provisions of the statute, provided they apply to injuries of this kind, not committed within this State, but in a foreign country; and the single question to be determined is, whether they do apply to such cases.

The statement of a few general principles which cannot possibly be the subject of controversy, and for which no authority need be cited, will greatly simplify the discussion. In the first place, the courts do not, in general, take notice of the laws of a foreign country, except so far as they are made to appear by proof. In the absence, however, of positive evidence as to the law of another country, our laws indulge in certain presumptions. *Prima facie*, a man is entitled to personal freedom

remaining after the payment of his debts. In other words, the creditors are the primary claimants of the succession, and the executor or administrator represents their interests. But under these statutes the creditors are passed by, and the whole of the proceeds of the recovery goes to the surviving relatives. Again, although the action can be maintained only in the cases in which it could have been brought by the deceased, if he had survived, the damages nevertheless are given upon different principles and for different causes. In an action brought by a person injured, but not fatally, by the negligence of another, he recovers for his pecuniary loss, and in addition for his pain and suffering of mind and body, while under the statute, it is not the recompense which would have belonged to him which is awarded to his personal representative; but the damages are to be estimated "with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person." This is a subject of damages which could not possibly have had any application in an action brought by the party injured if he had survived. This peculiarity has been noticed by Mr. Justice COLERIDGE in *Blake v. The Midland Railway Company*, (10 Eng. L. & E., 443,) in commenting on the British statute, (9 and 10 Victoria, ch. 93,) which is nearly like our own. The plaintiff, in a case under that statute, was allowed to recover for the mental sufferings of the wife on account of her husband's loss; but this was held to be erroneous by the Court of Queen's Bench. The learned Justice, in pronouncing the opinion of the court, refers to an argument of the plaintiff's counsel, that if the deceased had recovered he would have been entitled to a *solatium*, and that therefore his representatives ought to be allowed it; "but," he says, "it will be evident that this act does not transfer this right of action to his representative, but gives to his representative a totally new right of action on different principles." "The measure of damages," he adds, "is not the loss or suffering of the deceased, but the injury resulting from his death to his family." It may well be that if King had survived his injuries, he could have sustained an action against the defend-

within the territories of New Grenada, than the laws of that republic have in regard to New York transactions. It is no doubt within the competency of the legislature to declare that any wrong which may be inflicted upon a citizen of New York abroad, may be redressed here according to the principles of our law, if the wrongdoer can be found here, so as to be subjected to the jurisdiction of our courts; but as we could not by any legislation of this kind put an end to the liability of the party to the *lex loci*, or divest the foreign government of its jurisdiction over the case, such a statute would rarely be just in its operation, and would be more likely to lead to confusion and oppression than to any beneficial results. Hence, legislation of the kind suggested has not found any place in the statute books of modern nations, except in the case of laws respecting the army and navy, which, when operating abroad, must of course be governed by the laws enacted by the government of the country which sends them forth, and except also in regard to foreign commerce prosecuted in our own vessels. In such cases the fleets and armies, and ships of commerce carry with them the nationality which originally belonged to them. *Prima facie* all laws are coëxtensive, and only coëxtensive with the political jurisdiction of the law-making power. (Story's (Conf. Laws, § 18-20; *United States v. Bevans*, 3 Wheat., 336, 386; 3 Dall., 320—Translations from Huberus; *Bank of Augusta v. Earle*, 13 Pet., 519.) This limitation upon the operation of the laws of a country is quite consistent with the practice which universally prevails, by which the courts of one country entertain suits in relation to causes of action which arise in another country, when the parties come here so as to be made subject to their jurisdiction. Whatever liability the defendants incurred by the laws of New Grenada, by the act mentioned in the complaint, might well be enforced in the courts of this State; the defendant as a domestic corporation being readily compellable to answer here. But the rule of decision would still be the law of New Grenada, which the court and jury must be made acquainted with by the proof exhibited before them.

of their origin with them. But the legislature of this State consented to incorporate these grantees and other persons who had associated with them, in order that the company thus formed might concentrate the necessary capital to prosecute the work, and be enabled conveniently to transact their business by maintaining a perpetual succession, using a common name, and exercising the other attributes of a corporation. The legislature did not profess to confer upon them any rights in New Grenada, or to exempt them from any liabilities which would attach to natural persons there, or to retain over them any jurisdiction or control in respect to their liabilities to persons with whom they might come in contact in the course of their business in New Grenada. In my opinion the case does not differ, in the respect under consideration, from what it would have been if the grantees and their associates had entered into a partnership or private association for the purpose of carrying on their enterprise. The act simply creates an artificial person to represent the interests of the several natural persons who took shares in the undertaking. Acts of incorporation necessarily specify the particular business which the artificial body is authorized to carry on. This is essential in order to enable the government to restrain the corporation should it attempt to prosecute a general business, and thus compete with individual enterprise. It was accordingly stated in the act that the purpose was to construct a railroad across the isthmus. This was a business which could only be carried on in that region, and, therefore, so far as the legislature of New York was concerned, they were authorized to proceed there and to prosecute their enterprise, if they should be permitted so to do by the local government. I am unable to see any necessity for retaining over them any of the domestic laws or institutions of this State. There is not, as has been remarked, any indication of an intention to do so; and it is entirely certain that our legislature had no power to exempt them from amenability to the laws of New Grenada. Many corporations are created by this State for the transaction of a business which is not strictly local in its character as in the instance of banks

injury could be sustained in the courts of this State, except pursuant to the law of international comity. By that law foreign contracts and foreign transactions, out of which liabilities have arisen, may be prosecuted in our tribunals by the implied assent of the government of this State; but in all such cases we administer the foreign law as from the proofs we find it to be, or as without proofs we presume it to be. The cases of *Rafael v. Verelst* (2 W. Black., 1055), and *Mostyn v. Fabrigas* (Cowp., 161), were decided upon the presumption respecting the foreign law to which I have referred. Both cases were actions in the English courts for the imprisonment of the respective plaintiffs in foreign countries. The principle applicable to the present question was not much discussed, but Lord MANSFIELD said, in the last case, that whatever would be a justification in the place where the thing was done, ought to be a justification where the case was tried; thus putting the liability of the defendant upon the provisions of the foreign law. The question involved in this case has been several times before the Supreme and Superior Courts, and the views which I entertain respecting it have been frequently enforced in elaborate and well-considered opinions. The decisions have been adverse to the right to maintain the action except in a single case where the plaintiff prevailed at a special term; but that judgment was reversed on appeal to the general term. (*Vanderwater v. The N. Y. & N. H. R. R. Co.*, 27 Barb., 244; *Beach v. The Bay State Co.*, id., 248; *this case*, 3 Bosw., 67; *Crowley v. The Panama R. R. Co.*, 30 Barb., 99; *Beach v. The Bay State Co., on appeal*, id., 433.)

I am of opinion, with the Superior Court, that the acts of 1847 and 1849, do not apply to cases of death caused by the negligence or wrongful act of another, where the transaction occurred in a foreign country, and consequently that the judgment appealed from should be affirmed.

DAVIES, J. It cannot be well questioned that at common law and without the aid of this statute, no action could be maintained by any one for the damages sustained by the death of the plaintiff's intestate.

then every action founded on an implied promise to a testator, when the damage subsists in the previous personal suffering of the testator, would also be maintainable by the executor or administrator. All injuries affecting the life or health of the deceased, all such as arise out of the unskillfulness of medical practitioners, the imprisonment of the party brought on by the negligence of his attorney, all these would be breaches of the implied promise by the persons employed, to exhibit a proper portion of skill and attention. We are not aware, however, says the Chief Justice, of any attempt on the part of the executor or administrator, to maintain an action in any such case. When there is damage done to the personal estate of the deceased, that involves a different question.

One of the earliest cases reported, bearing on this subject, is that of *Higgins v. Butcher*, and which arose in the time of James I, about the year 1600. (1 Brown., 205; 1 Yel., 89; Noy, 18 S. C.,) The plaintiff declared, that the defendant assaulted and be at, &c., one A. his wife, such a day, of which she died such a day following, to his damage, &c., and it was moved by Foster Serjeant, that the declaration was not good, because it was brought by the plaintiff for beating his wife, and that being a personal tort to the wife, is now dead with the wife; and if the wife had been alive, he could not without his wife have this action for damages, which shall be given to the wife for the tort offered to her body, *quod fuit concessum*."

In *Baker v. Bolton* (1 Camp., N. P., 493), the plaintiff declared that he and his wife were riding on the top of a stage-coach, when it was overturned, whereby he was much bruised and his wife was so severely hurt that she died about a month after in the hospital. The declaration, beside other special damage, stated that, by means of the premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation and anguish of mind. It appeared that the wife of the plaintiff had been of great use to him, in conducting his business. Lord ELLENBOROUGH told the jury that they could only take into consideration the bruises

Berkshire Railroad Company (id., 480), Chief Justice SHAW says: "It is perfectly well settled, as a rule of the common law, that all rights of action for injury to the person die with the person; and it follows, therefore, if either the plaintiff or defendant should die before judgment, any existing action brought to recover such damage must abate; and if none had been brought by the party injured, none could be commenced by his personal representative. It was the obvious purpose of the statute to reverse this rule of law, to provide *that the right of action should survive*, as in cases of damage to property, and, of course, be liable to be prosecuted by or against an executor." In *Safford v. Drew* (3 Duer, 637), HOFFMAN, J., says: "In the first place, it is to be noticed that, by the rules of the common law, before the statute, no action could be maintained by personal representatives of a deceased person for loss or damage resulting from his death." It is unnecessary to refer in detail to the many cases scattered through the books sanctioning this doctrine. There is one other, in this court, which ought not to be omitted. It is that of *Quin v. Moore* (15 N. Y., 432), in which COMSTOCK, J., delivering the opinion of the court, says: "For example, in the present case, James Kernes was a minor; his mother was, by law, entitled to his services until he became of age: of these she was deprived by the wrongful or negligent act of the defendants, which destroyed his life. The common law gave no action for this injury. The statute, possibly with greater justice, declares a different principle, and holds the wrongdoer liable to make compensation." (See, also, *Vandeventer v. N. Y. & N. H. R. R. Co.*, 27 Barb., 244, and cases there cited; *Green v. Hudson River R. R. Co.*, 28 id., 9; *Crowley v. Panama R. R. Co.*, 30 id., 99.) These authorities conclusively settle the question that, where injuries are inflicted causing the death of the person, all right of action for such injuries dies with the person upon whom they are inflicted. The exceptions are, that a husband may maintain a civil action for an injury to the wife, so far as medical service and funeral expenses were incurred, or a parent for the loss of a child's service up to the time of its death; but not for the loss of life.

in another State than this, where no statute like ours was in force, he would have to maintain and establish that the statute of this State must be recognized and enforced in the forum which he had sought. Suppose a similar transaction to this had taken place in England, and the person on whom the duty safely to transport, rested, had resided there after the passage of the act of 9 and 10 Victoria, and a similar accident had happened, and the administrator had sought his remedy in the courts of this State happening to find the party liable under this statute within this State, can it be seriously maintained that by virtue of the act of 9 and 10 Victoria, he could recover here? I suppose clearly not; and these illustrations show that the plaintiff cannot, in this action, recover by virtue of our statute, for injuries which occurred to his intestate, happening where that statute had no force. It is unnecessary to add, that a statute of a State of this Union has no extra territorial effect. And while all transactions occurring here, or liabilities for acts done here, are to be affected and governed by our local law, no such result follows transactions occurring in a different State or territory where those laws are unknown, where they are entirely inoperative, and where different rules applicable to the subject-matter may prevail. *Warley v. Cincinnati, Hamilton and Dayton Railroad Company* (1 Handy's R., 481), *Campbell v. Rogers* (2 id.), *Ashley v. White*, (2 Smith Leading Cases, 181, note), sustain the principle, that an action arising under a similar statute cannot be maintained where no such statute was in force in the State or territory where the injury was inflicted. In our own State there have been several decisions on this precise point. (*Vandeventer v. N. Y. & N. H. R. R. Co.*, 27 Barb., 244; *Whitford v. The Panama R. R. Co.* 3 Duer, 67; *Crowley v. Panama R. R. Co.*, 30 Barb., 99; *Beach v. Bay State Co.*, 16 How., 1; *S. C.*, 30 Barb., 433.) The cases in 27 Barbour and 16 Howard are special term decisions, the others were made at general terms. In the case in 3 Duer, the question is very elaborately discussed by Mr. Justice WOODRUFF. The reasoning of this very able opinion is, in my judgment, eminently sound and conclusive. The learned

civilized world, as valid laws, so far as to give a right of action whenever jurisdiction of the person could be obtained. An act of the legislature of this State would thus practically become universal public law. I think this cannot be the intent or force of these acts. They are purely *local*, and limited to the sovereignty and domain of the State, and only apply where the subject-matter of the action arose within this State." In *Beach v. Bay State Company* (30 Barb., 433), the general term in the first district had under consideration the question presented for our determination in this case. It arrived at the conclusion that the action given by the statutes of 1847 and 1849 could not be maintained where the injuries were inflicted without this State. SUTHERLAND, J., says: "There is nothing in the acts of 1847 and 1849 which shows that they were intended to protect the lives of its citizens while out of the State;—nothing to show that they were intended to extend to acts, neglects or defaults, committed or suffered in another State. It must be presumed, I think, as the result of the general principle of the territorial limit of political jurisdiction, and of the force of laws, before adverted to, that these statutes were intended to regulate the conduct of corporations, their agents, engineers, &c., and of other persons, whilst operating or being in this State only. If a citizen of this State leaves it and goes into another State, he is left to the protection of the law of the latter State."

Again it is to be observed, that the third section of the act of 1849 is highly penal. It denounces as a crime and punishes by imprisonment and fine, the same wrongful acts, neglects or defaults, for which an action is given by the first section. Can it be for a moment argued that the servants of the defendants could be indicted and punished in this State for the wrongful act, neglect or default, by which the plaintiff's intestate lost his life? Criminal actions and proceedings are strictly local, and to subject an offender to punishment the crime must be committed within the limits of the sovereignty seeking to punish the offense. This view of the subject furnishes, in my judgment, a conclusive answer to the claim, that the party

indemnity which he has received will be subject, like any other estate which belonged to him, to distribution according to law. But if he dies without receiving such indemnity, or recovering a judgment therefor, the common law has provided no successor to the right; and the compensation due to the injured party in his lifetime becomes lost to his estate. This being manifestly unjust, the legislative power has intervened in many of the States, and in the parent country, to correct the evil. Legislation of this kind, although suggested by the exposures and accidents attending the new modes of travel which I have mentioned, is, nevertheless, general in its application, and is founded in a principle of universal justice.

But this legislation, with us, however it may be elsewhere, is remedial, and not creative. It adds no new definition to the category of actionable injuries, but it provides that immunity to the offender shall no longer be the consequence of the death of him who is injured, if such death be occasioned by the wrongful act or neglect. No new cause of action is created by the legislature; but the cause which, by the rules of the common law, has become lapsed or lost by the decease of the person to whom it belonged, is continued and devolved upon his administrator, who takes it by representation, as he takes other personal estate and rights of the decedent.

This is the conclusion suggested by a view of the evil or injustice which required a remedy; and it is fortified by the terms of the legislative act under which this action was brought. (Laws of 1847, p. 575, ch. 450.) That statute declares, in its first section, that, "whenever the death of a person shall be caused by the wrongful act, &c., and the act, &c., is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, *notwithstanding the death of the person injured*, and although the death shall have been caused under such circumstances as amount in law to a felony." This language plainly points to the wrongful act or

tion, like other rights, upon his representative. This is the theory of the statute, unless its language is strangely chosen to express the purpose intended.

It is said, however, that according to the 2d section, damages may be given by the jury with reference to the pecuniary loss to the wife and next of kin, resulting from the death of the injured person. This is true, but it has no tendency to show that the death is the original cause of the suit. The death is the consequence of the wrong, and like any other consequence it may have a just bearing upon the question of damages. In the contemplation of the statute, the life of the person wronged has a greater or less value to his estate, and if his life be taken away, the amount of the loss from that cause is one of the items, and if the death be sudden it may be the chief or only item to be considered in adjusting the compensation.

The true point of inquiry is, whether a wrong of this nature resulting in death affords more than a single cause of action. If it does not then the proposition becomes too plain for argument, that the right is wholly vested in the injured party until he dies, whether he survives the casualty a moment or a month; and consequently he may deal with such right in any manner he pleases.

Now, to affirm that, in cases of this nature, two causes of suit arise, one in favor of the decedent in his lifetime, the other founded on his death, is to depart from the plainest legal analogies. An assault and battery resulting in death, is a case precisely within the statute, and we may take it as an illustration. The injured plaintiff bringing his action at the common law, must recover entire damages because the tort is single and indivisible. After one trial and recovery no new development of injury or damage will justify another suit. So if one satisfaction is received, another cannot be claimed on the ground that new consequential results of the wrong have appeared, which were unknown at the time when the satisfaction was accepted. The principle is well illustrated in an early reported case, where a piece of the plaintiff's skull came out,

to or recovered by him, those entitled in succession after his death would take the benefit. But, not being paid or recovered, they are forever lost, if the proposition contended for in this case is sound. That proposition is, that the action of the representative in such cases is founded on the death as a cause of suit, distinct from the compensation which the injured person has a right in his lifetime to claim. But the statute says that the damages may be recovered, not for the death, but "*notwithstanding the death.*" The legislature thought it unjust that the wrongdoer should allege that the injury inflicted by him was fatal, in other words the highest possible aggravation of the wrong, in bar of the claim for damages. They, therefore, changed the rule of the common law by providing that the damages should go to the representative for the benefit of the wife and next of kin. My conclusion is, that the claim of the decedent, in his lifetime, under the statute always vests in the representative. Some remarks of mine in *Quin v. Moore* (15 N. Y., 435), may be in opposition to this view. But they were unnecessary to the decision of that case, and were not well considered.

It may be urged that the party, while living, can never recover a compensation for his own death by a verdict rendered in his lifetime. In mere words, this is a plausible statement. But, in a legal point of view, the difficulty does not exist. Every suit to recover damages is brought, in a just sense, for the benefit of the plaintiff's estate. On the trial of an action for a personal injury, it may appear that death must afterwards ensue as the result of the wrong. Medical science may easily demonstrate the fact. Or, it may appear to be doubtful whether the plaintiff will be a helpless cripple while he lives, and die in the course of nature; or whether he must die from his injuries within a few days. Upon a doubt of that kind, would it be proper to instruct a jury to mitigate the damages in case they believed that death must ensue? Plainly this cannot be so. It was never heard that an assault and battery, or other tort to the person, was of less consequence in the eye of the law because it is attended with such force and

of action: that being established, all the circumstances attending and resulting from the wrong would enter into the measure of damages; and where there is but one cause of action in the lifetime of the party, I think that the action by his representative is not only for the same wrong, but that the damages to be recovered are determined according to the same principles and facts. Such a wrong, therefore, admits of but one satisfaction, which was had in the present case before the suit was brought.

HOYT, J., also dissented.

Judgment affirmed.

DAGAL v. SIMMONS *et al.*

An answer is sufficient to set up the defence of usury to an action on a promissory note where it states an agreement, upon the application for a loan, to give more than legal interest, and that the lender deducted from the amount for which, with interest, the note was made "about enough, as he said, to buy a barrel of flour, which amount, as the defendants believe, was seven or eight dollars."

The case of *Manning v. Tyler* (21 N. Y., 567), considered and distinguished.

APPEAL from the Supreme Court. The judgment at special term was against the defendants on account of the frivolousness of their answer, and this was affirmed at general term in the third district. The defendants appealed to this court. The complaint counted on a joint and several promissory note made by the defendants for the payment of \$175, with interest, six months from its date, December 5th, 1855. The defendants put in a joint answer, in which they averred that Simmons, being desirous of obtaining a loan of money, authorized the defendant Wooster to procure the same for him. "And the defendant Simmons, upon information and belief, further says, that Wooster accordingly applied to the plaintiff for a loan." It then states in substance as follows:

That the plaintiff said he must have more than legal interest; that Wooster then agreed to give him more than legal interest; that the defendants then procured of the plaintiff \$70, and gave him their note therefor, the plaintiff then saying that, in a short time, he would let them have more money. That in pursuance of this agreement, on the 5th of December, 1855, the defendant Simmons received of the plaintiff, the former note of about \$70, and bank bills and silver, sufficient to make together \$175, the plaintiff taking therefrom about enough, as he said, to get him a barrel of flour, which amount the defendants believe was about seven or eight dollars. And the defendants then gave to plaintiff their note for \$175 with interest.

"And the defendants further say, that said money was let as above-mentioned, and for more than the legal interest of seven per cent per annum, contrary to the statute, and the defendants charge and claim that said note in the complaint mentioned is usurious and void." The answer was verified by both defendants as true of their own knowledge, except as to such matters as were therein stated on information and belief, and as to such matters they affirmed their belief of its truth.

The cause was submitted on printed arguments

Clarence Buel, for the appellants.

R. A. Parmenter, for the respondent.

BY THE COURT—LOTT, J. The answer does not allege the facts and circumstances set up as a defence with such precision and certainty as ought to characterize a proper pleading; but the defects relate to the form, and not to the substance, of the allegations contained therein.

It avers that the note in question was given on a loan of \$175 by the plaintiff to Simmons, one of the defendants, upon an agreement that more than legal interest should be allowed therefor, contrary to the statute, and that, in pursuance of such agreement, the excess was deducted from the amount borrowed.

The precise amount of such excess is not stated, it being alleged that the plaintiff took "about enough, as he said, to get him a barrel of flour, which amount defendant believes was about seven or eight dollars;" and then it is stated that the note was given for the entire amount of the loan, and it is payable, with interest, in six months from its date. These allegations, as I understand the answer, are made by both of the defendants, although the defendant Simmons makes the statement as to the particulars of the negotiation for the loan on information and belief merely. This was carried on by his co-defendant Wooster for him, and not by himself personally. He consequently could not answer in respect to it as of his personal knowledge. The answer commences with an averment by both of the defendants "that the note was given under the following circumstances," which are then detailed (the defendant Simmons, as before stated, answering on information and belief as to these), and concludes with the further averment by both of them, "that the cause of action mentioned in the complaint in this action arose out of the above-mentioned loan," and with the charge and claim that said note is usurious and void.

The facts and circumstances stated appear to me clearly sufficient to constitute usury.

The substance of the answer is, that the plaintiff received, in pursuance of an agreement to take more than lawful interest, contrary to the statute, seven or eight dollars of such excess for the loan of the sum of \$175 for the term of six months by the plaintiff to the defendant Simmons, and that the note in question was given to secure the sum loaned, with legal interest thereon. If more particularity was required as to the amount of such excess, application should have been made, under section 160 of the Code, to have the answer made more definite and certain by amendment. (*Prindle v. Caruthers*, 15 N. Y., 425.) It, however, contained a substantial defence as stated, and, on the trial, a variance as to the amount of interest would not have been material in the absence of proof that the plaintiff was misled. (*Cutlin v. Gunter*, 1 Kern., 368.) It was settled by this case that the same rule is to be applied

answer, not unlike that in the present case, frivolous. This answer does not at all come up to the rule laid down in the dissenting opinion in that case. It was there said "the cases are numerous and decisive, which hold that the terms of the usurious contract should be stated, so that it shall appear what rate or amount of interest was taken or accrued, and on what sum and for what time." The answer in this case is singularly defective and obscure, and its uncertainty and ambiguity, create a strong suspicion that the defence suggested is sham, and has no foundation. If a usurious agreement had been made, and consummated by the taking of unlawful interest, it could have been clearly stated, and as the answer was to be upon oath, it must necessarily have been truly stated. I think if these defendants had in truth any such defence, they would have spread it upon the record, and verified it by their oath. Their omission to do so, and the bungling attempt to indicate one in the most ambiguous and indefinite way, lead my mind to the conclusion, that none such in fact existed. The judgment of the special term upon this answer was right, and the judgment appealed from should be affirmed.

JAMES J., also dissented.

Judgment reversed, and a trial ordered.

MILLER v. COOK.

The words "for value received" in a guaranty of a promissory note, are a sufficient expression of the consideration within the statute of frauds.

APPEAL from the Supreme Court. The complaint averred the making and delivery by Markel and Schott of their promissory note for \$175, payable to one Stephen M. Cook, or holder, three months from February 26, 1857: that on the 16th March, 1857, the defendant, Silas A. Cook, who was then the

of the note referred to. The motion for the nonsuit was denied, and the plaintiff had a verdict. Upon a writ of error to the Supreme Court, COWEN, J., in delivering the opinion of the court says, in reference to this point, "upon the merits, the objection that no consideration is expressed in the guaranty is not founded in fact. The words 'for value received' are a sufficient expression."

The same point was expressly passed upon by the Supreme Court in *Douglass v. Howland* (24 Wend., 35,) the court holding that the words "for value received" are a sufficient expression of the consideration within the meaning of the statute. A like ruling was made by the Supreme Court of the eighth judicial district in *Cooper v. Dederick* (22 Barb., 516), *Lapham v. Burrett* (1 Vt. R., 247), *Whitney v. Stearns* (16 Me. R., 394.) In *Brewster v. Silence* (4 Seld., 207), a distinct intimation was given by the learned judge, who delivered the opinion of this court, that the words "for value received," if contained in the guaranty, would have been a sufficient expression of the consideration, and would have saved it from the condemnation it received. We are all of the opinion in this case that the consideration is expressed in the guaranty, and that the words "for value received" adequately and sufficiently express it.

The judgment appealed from must be affirmed, with costs.

All the judges concurred. Most of them were moreover inclined to the opinion that the case was not within the statute of frauds; on the ground that the defendant was to be taken as having executed the guarantee upon the transfer of the note for value received of the plaintiff—a new and distinct consideration, independent of the debt of the makers of the note, and moving between the parties to the new promise. This point however was not passed upon.

Judgment affirmed.

course of the boundary carried the plaintiffs to the centre of the creek, or only to the bank. Upon this point the judge, under exception by the plaintiffs, charged the jury that the plaintiffs, by virtue of the conveyance, owned to the north bank of the creek and not to the centre. The jury rendered a verdict for the plaintiffs for so much of the premises claimed as lies north of the top of the slope of the north bank. Both parties made bills of exception. The defendant declined to appear upon the argument before the Supreme Court at general term, designing that a new trial should be ordered by default, so that nothing should be determined as to the law of the case. The Supreme Court, however, upon the application of the plaintiffs, took the exceptions for actual consideration; and after deliberating thereupon, denied a new trial to either party, and affirmed the judgment. The plaintiffs appealed to this court.

John K. Porter, for the appellants.

Marcus Sackett, for the respondent.

COMSTOCK, Ch. J. We do not entertain any serious doubt upon the question presented in this case. The rule of construction contended for by the plaintiffs has often been considered by the courts, and has become well settled. In the case of *Child v. Starr* (4 Hill, 369), it was held that a boundary line running eastwardly to the Genesee river, thence northwardly along the shore of the river, conveyed no part of the bed of the stream, and that the grantee took only to low water mark. But the controlling words were, "along the shore of the river;" and upon the force of those words alone the judgment of the Supreme Court, which had been the other way, was reversed in the Court of Errors by a single vote. Chancellor WALWORTH, who gave the leading opinion, said: "Running to a monument standing on the bank, and from thence running by the river or along the river, &c., does not restrict the grant to the bank of the stream, for the monuments in such cases are only referred to as giving the directions of the lines *to the river*,

intention of parties will be continually violated, and litigation become interminable."

The boundary in question has one peculiarity which may deserve a moment's attention. The point of commencement is on the north bank of the creek. The courses being irregular, and the stream a winding one, the former cross the latter three times before reaching the last course but one, and that course and distance are carried across the fourth time; thus returning to the north bank at a post, from which the last line is drawn to the place of beginning. It is claimed that, by thus recrossing the stream to a monument in order to reach the same bank from which the description began, the whole bed of the river is necessarily excluded. But we think there is nothing in this peculiarity to take the case out of the general rule. Both at the first and the last points in the description, monuments were necessary in order to mark the places of intersection with the stream. Such monuments are never located, in fact or in description, in the channel of a river; and, in order to avoid apparent incongruity in a boundary like the one in question, they must both be placed on the same shore. If the last monument, or point of intersection, had been placed on the south shore, and from thence the line had proceeded along the shore or the river, the paper lines would have been incomplete without another crossing of the stream to the place of beginning on the north side. If such had been the description, the crossing line included, it might have justified a strong inference that the whole bed of the river was intended to be embraced. The most obvious mode, therefore, of indicating the river, that is to say, the centre, as the dividing line, was to draw the last course but one to the same bank on which the first monument stood; and it does not seem to us material whether the stream had not been previously crossed at all, or whether the bank was reached by recrossing it on a return course. The presumed intention of the parties, and, therefore, the construction of the boundary, must, we think, in either case, be the same. The land in question on this appeal lies between the top of the bank and the centre of the river on the last line and course in

of household furniture. The plaintiff, who was a married woman, made her husband a defendant with the sheriff, alleging the furniture to belong to her separate estate. Upon the trial these facts appeared: In December, 1855, the defendant, Jacob Allen, executed a chattel mortgage of the property in question to his daughter, Mary N. Allen, to secure \$680.25, therein stated to be for money lent by her to him. The evidence tended to show that it was the amount of a legacy given to Miss Allen while a minor by her deceased grandfather, and which had been received and kept for some years by her father. The plaintiff produced and proved a promissory note made by the defendant, Allen, to his daughter, Mary, for \$500, dated June, 1851, which was claimed to have been given for such legacy. There was no change of possession of the property mortgaged, but it remained in the house of Jacob Allen, and in use by his family. In March, 1856, the property was sold under the mortgage at the house of Jacob Allen, and was purchased by one Lawrence, a nephew of the plaintiff. He removed none of the property, but immediately after the sale he took his aunt into the parlor and pointing out to her the sofa, chairs, table and other furniture in that apartment, told her that he gave her that property and all the rest he had purchased that day. Some of it was in other rooms, and not in sight of the parties. The property was thereafter used in the house where Mr. Allen and his wife, the plaintiff, continued to reside. Lawrence, at the time of his purchase, paid only sufficient money to cover the expenses of the sale, but gave his note for the residue of the price to Mary N. Allen, the mortgagee, who handed to her mother, the plaintiff, by whom it was produced at the trial, being past due and unpaid.

In January, 1857, the sheriff of Washington county seized the property upon an execution against Jacob Allen on a judgment recovered in September, 1856; upon which this action was commenced. The judge nonsuited the plaintiff on the grounds that there was no sufficient proof of consideration for the mortgage to Mary Allen: of excuse for want of a change of possession under the mortgage, or of a gift from Lawrence

enough in it to take care of you a spell." He went away, and returned in a few days, and occupied the room, and used the trunk and clothes as usual, until he died a short time thereafter. The woman took the trunk and contents after his death, and it then contained a pass-book in a savings bank. Held, to be a valid gift of the book, and of the money mentioned therein standing to his credit in the bank. (*Penfield v. Public Administrator*, 2 E. D. Smith R., 805.)

Much more was done in the case under consideration. A considerable portion of the property was in the room where the parties were; it was pointed out to the donee by the donor, who said, "I give you this property, and all I have bought to-day," and went away, and left it at the absolute control of the donee. The mere fact that the donee and her husband lived together, and occupied the house as man and wife cannot affect the question. The wife may now own personal property, separate from the control of her husband, and the reducing of it to possession by him does not divest her of her property.

Under the law, as it now stands, where the wife has separate property, which is kept in the house in which she and her husband reside, it is to be deemed in her possession, as much as the property of the husband kept therein may be deemed in his possession. Assuming therefore that Lawrence obtained a good title by his purchase, when he gave it to the plaintiff and the possession was continued in the house occupied by her and her husband, it is to be deemed her possession. We think the judge at the circuit was wrong in holding, as a matter of law, that there was not a valid gift of the property to the plaintiff.

The questions as to whether or not there was sufficient proof of the consideration of the mortgage to Mary N. Allen, or sufficient proof of excuse for want of change of possession under the mortgage, will be considered together.

The mortgage upon its face acknowledged an indebtedness from the mortgagor to the mortgagee, of \$680.25, and was given to secure the payment of that amount, with interest, on

lent by reason of such omission. I concede that the failure of the mortgagee to take possession of the property; the want of proof of an actual valid consideration for the mortgage; the fact that the mortgagee was a daughter of the mortgagor; the relationship of the purchaser at the sale; the fact that no considerable portion of the purchase-money was paid at the sale, except by the purchaser's note, which is still unpaid; the immediate donation of the property by him, to the wife of the mortgagor, and the continued possession thereof by her or her and her husband, are circumstances proper to be submitted to a jury, from which they might or might not determine that the mortgage and subsequent sale thereon, the purchase by Lawrence, and donation to the mortgagor's wife, were all acts done with intent to defraud, or hinder and delay the creditors of the mortgagor, in the collection of their debts; and if the jury had so found, I think their verdict would have been conclusive. But this should have been submitted to the jury, instead of being determined as a matter of law by the court.

The fourth proposition on which the complaint was dismissed at the circuit, was, that if the proof of the gift was sufficient, the possession of the property by Allen afterwards, made the property his, and subject to execution against him. This proposition has already been answered in the assertion, that if Lawrence acquired a valid title to the property, and the gift to the plaintiff be valid, the subsequent possession must be deemed the possession of the plaintiff.

I think the judgment should be reversed, and a new trial ordered, costs to abide the event.

All the judges concurring,

Judgment reversed, and new trial ordered.

hausted in the payment of dividends, all the property and assets of the bank, except some demands in process of collection,—stated to be mostly in suit or in judgment—and which were the same that he had by the order of the court refrained from selling. Of these, demands to the amount of \$34,000 were, in the receiver's opinion, probably collectible, and the remainder, to the amount of \$149,000, he esteemed doubtful. This report and list of stockholders were, by order of the court, referred to a referee to apportion the debts and liabilities of the bank among its stockholders. Upon a petition of the stockholders, and on a special report of the referee, the time for the apportionment of the debts was extended to July, 1859, and the receiver was ordered to sell at auction some of the demands which the referee had reported could be best converted into cash in that mode, and to make a further dividend of the proceeds of such sale. Under this order a further dividend was made of \$24,375.63, leaving a considerable amount of demands uncollected and unsold. On the 13th February, 1860 (proceedings for the apportionment of debts having been further stayed by sundry orders of the court till 1st December, 1859), the referee made his general report and apportionment. The exceptions taken to the report by several stockholders were heard at special term on the 2d of April, 1860, and an order was then made confirming the report and apportionment, and judgment was entered thereon against the several stockholders for the amount apportioned upon them respectively. Upon appeal by several stockholders, the court, at general term in the eighth district, reversed the order of confirmation, and the judgment entered thereon, and also reversed the order directing the reference and all the proceedings thereon. The receiver appealed to this court.

John L. Talcott, for the appellant.

Chauncey Tucker for the respondents.

SELDEN, J. It is insisted by the respondent's counsel that no appeal lies to this court from an order or judgment of a

two previous sections regulate appeals directly from orders which immediately precede the order of reference; and then follows section 27, which provides, that no appeal shall be taken from such an order. The grouping of these sections shows, that they all relate to direct appeals from the orders to which they respectively refer. If it had been intended to repeal, in respect to this class of orders, the general provision that, upon an appeal from a final order or judgment, all previous orders may be reviewed, it is fair to presume that different and more appropriate language would have been used. The only question of doubt, therefore, which the case presents is, whether the judgment of the Supreme Court, at general term, was right.

In reversing the order of reference made at special term, that court proceeded upon the authority of the case of *The Reciprocity Bank* (22 N. Y., 9), in which this court was called upon to put a construction upon some of the most material provisions of the act of 1849. This act is not free from obscurity; and there is some difficulty in so interpreting it as to harmonize its various provisions. Its design, however, in one respect, is entirely clear. It was not intended to authorize any proceeding to compel payment by the stockholders until all the assets of the bank, readily convertible into cash, shall have been converted and the avails distributed among the creditors. This is plainly to be inferred from the imperative direction to the receiver to convert the securities deposited with the Comptroller into cash "with the least possible delay" (§ 12), and from the power given him to sell the assets at auction, with a view to a dividend; and it is rendered still more apparent by the clause giving to the receiver ninety days in which to make the dividend, and authorizing this time to be extended ninety days by a judge. The only conceivable motive for this provision for extension is to enable the receiver to convert and apply all the convertible assets before calling upon the stockholders to make up the deficiency.

It is, therefore, obvious that, for a receiver to make a dividend among the creditors and proceed against the stockholders,

no circumstances can proceedings be instituted against the stockholders until all the assets in the hands of the receiver, not in litigation, have been converted into money. It would be difficult to reconcile this position with the provisions of the act. The receiver is absolutely required, by section 12, to declare a dividend within the period of one hundred and eighty days from the time of his appointment. He cannot sell any of the demands due to the corporation without the authority of a judge. If, therefore, for any reasons, the judge, when applied to, deems it inexpedient to sell, and withholds the necessary authority, the receiver has no power to convert into cash such demands as cannot be collected within the one hundred and eighty days. These provisions are irreconcilable with the position that the whole effects must, under all circumstances, be converted before calling upon the stockholders.

The true interpretation of the act seems to me to be this: The assets of the bank are deemed the primary fund for the payment of its debts. The creditors, however, are not to be delayed beyond the period of six months, for the purpose of converting these assets, before proceeding against the stockholders. All that can be realized in that time by collection, or by a sale to which no reasonable objection exists, is first to be applied. If, however, there is sufficient reason for postponing a sale of any portion of the demands due to the bank, beyond the one hundred and eighty days, the creditors are not bound to wait for a future sale, but a dividend must be made, and the stockholders must pay the deficiency and receive the avails of the remaining assets.

The only question of doubt which this interpretation leaves is, whether the propriety of postponing a sale, beyond the time in which it is necessary to make a dividend, is left entirely to the discretion of the receiver, or whether that question must be referred to a judge. This doubt was resolved by the decision in the case of *The Reciprocity Bank*. Before a receiver can proceed against the stockholders, his report must show, either that all the assets not in litigation have been converted

In the present case, on the contrary, the proceedings would seem to have been conducted in most respects in view of such a construction of the statute, as that here suggested. I am inclined however to think that the making of the first dividend, which is to lay the foundation of proceedings against the stockholders, cannot be properly delayed beyond the one hundred and eighty days. The authority to postpone, conferred by section 12, being specific, and applying to that particular act of the receiver, and nothing else, I scarcely think the provision can be considered as nullified by the subsequent general provision in section 23, authorizing a judge to postpone some of the proceedings for a year. But within the time allowed by section 12, I see no objection to doing as was done in this case, viz., making a preliminary distribution of any funds which the receiver may have on hand in advance of the formal dividend provided for by that section.

In respect to the unconverted assets, the receiver seems to have proceeded in every step by the direction of a judge. Before making a dividend, which was to charge the stockholders with a deficiency, he made a full report, setting forth by schedule all the assets and describing the character and situation of such as remained unconverted, and asked for an order directing an "immediate sale" at auction, of such portions as the judge should deem it expedient then to sell. An order was obtained, which on subsequent application was modified from time to time. This was a very proper proceeding, and in precise accordance with the construction of the statute which has been here adopted, except that all this should have been done before the expiration of the time prescribed in section 12, for making the dividend. The delay, however, does not affect the present question. The final report of the receiver shows, that before the dividend was actually made, all the assets, not in litigation, had been converted, except certain choses in action which he had refrained from selling by the order of the judge. The receiver could do no more. He was bound by statute to make the dividend, and could not sell without the authority of a justice of the court. Under these

The policy recited that it was "in consideration of the sum of ninety-seven dollars and forty cents in hand paid by John C. Ruse, and of the annual premium of ninety-seven dollars and forty cents to be paid on or before the tenth day of April in every year during the continuance of this policy." It also provided that, "in case the said John C. Ruse shall not pay the said annual premiums on or before the several days herein-before mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured or any part thereof; and this policy shall cease and determine."

Upon the trial it was proved that the premium for the second year, which, by the terms of the policy, became due April 10, 1847, was not then paid. Bugbee died April 13, 1847. Within a day or two afterwards, the plaintiff tendered the premium to the defendant's agent, and he declined to receive it.

The plaintiff proved, under an exception by the defendant, that, at the time of the application for insurance, the defendant's agent delivered to him a printed paper of several pages, entitled a prospectus, setting forth the advantages of life insurance in general, and the particular inducements held out by the defendant. So much of this as is material, is cited in the following opinion.

The plaintiff gave no evidence of any pecuniary interest in the life of Bugbee, or of any relationship to him. The defendant moved for a nonsuit, on the ground that the policy was forfeited by the failure to pay the premium on the day appointed and that the plaintiff had shown no interest in the life insured. The nonsuit was refused, and the defendant took an exception. The plaintiff had a verdict and judgment, which having been affirmed at general term in the first district, the defendant appealed to this court.

Alvin C. Bradley, for the appellant.

John W. Edmonds, for the respondent.

The question first to be considered on this subject is, whether the prospectus is to be treated as part and parcel of the contract between the parties. It was not referred to in, nor in any manner annexed to, the policy. Nothing is better settled than that, where two parties have entered into a written contract, all previous negotiations and propositions in relation to such contract, whether parol or written, are to be regarded as merged in the final agreement. Such preliminary matter may sometimes be admissible under the rule which admits evidence of the surrounding circumstances for the purpose of explaining an ambiguous expression; but never where the terms of the contract are clear and explicit. The legal inference, in all such cases, if the contract varies from what has been previously said or written, is, that the parties, upon further consideration, have changed their views. Policies of insurance are no exception to this rule, as a brief reference to the cases on the subject will clearly show.

It was held by Lord MANSFIELD, in the case of *Pawson v. Barnevelt*, that a written memorandum in regard to the subject of insurance, which was shown to the underwriter at the time of subscribing, and then wrapped up in the policy, did not thereby become a part of the contract; and, in the subsequent case of *Bize v. Fletcher*, the same judge ruled that a strip of paper, describing the condition of the ship insured, although wafered to the policy itself, was to be regarded as a representation merely, and not as a part of the policy. (Doug., p. 12, note 4.)

It has, however, been decided in this State that where, in making the policy, the insurance company used a printed form covering one-half of a sheet, upon the other half of which was a printed memorandum, headed "conditions of insurance," this memorandum was to be treated as a part of the contract. The juxtaposition of the papers is, in such a case, considered as affording *prima facie* evidence that such was the intention of the parties. (*Roberts v. The Chenango Mut. Ins. Co.*, 3 Hill, 501; *Murdock v. The same*, 2 Comst., 210.) No case seems to have gone further than these, in incorporating extrinsic documents into a policy of insurance.

when the conditions of a contract proposed in the preliminary negotiations between the parties, varied from the contract as finally consummated, that, although such conditions form no part of the contract, they may, nevertheless, operate as an estoppel upon the parties. The reasons given why these introductory propositions do not become incorporated into the contract, viz.: that they are presumed to have been subsequently waived or abandoned, conclusively repel all idea of an estoppel in such a case.

It follows, that the policy must be considered as embracing the entire contract between the parties; and the plaintiff must abide by the explicit provision, that the policy should cease and determine in case of a failure to pay the premiums according to its terms.

But assuming, that the prospectus became a part of the policy, and had the effect to modify its provisions in respect to the time for the payment of the premium, it is still insisted, that there could be no recovery without proof that the plaintiff had an interest in the life of Bugbee. In considering this point, it is necessary first to ascertain, by what law the question is to be determined. The contract was actually made between the plaintiff and an agent of the defendants, in the State of Georgia; but the defendants, as is to be inferred from the case, were incorporated in the State of New Jersey, and the policy purports upon its face to have been executed at the city of Newark in that State. Under these circumstances, although the suit is brought in this State, the interpretation and validity of the contract cannot depend upon the laws of New York. The *lex fori* governs, as to the remedy or remedies for enforcing the contract, but not as to its construction, or the legal rights arising under it. These depend usually upon the laws of the place where the contract is to be performed; although where there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, although the contract is to be performed elsewhere. I see nothing in the present case to indicate that the parties contracted with

independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured.

A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong?

Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void, even at common law. It was so held in England, at an early day, by Lord Chancellor KING, in *Lynch v. Dalzell* (4 Bro. P. C., 481), and by Lord HARDWICKE, in *Saddlers' Company v. Badcock* (2 Atk., 557); and the courts in this country have generally acquiesced in and approved of the doctrine. In this State such policies would fall under the condemnation of our statute avoiding all wagers and gambling contracts of every sort; but they would, no doubt, also be held void, independently of that statute, at common law. In *Howard v. The Albany Insurance Company* (3 Denio, 301), BRONSON, Ch. J., asserted the necessity of an interest in the assured in all such cases, referring, in support of the doctrine, not to the statute, but to the decisions of the Lord Chancellors KING and HARDWICKE (*supra*).

In regard, however, to marine insurances, a different rule seems to have prevailed in England; and the cases of *Glendinning v. Church* (3 Caines, 141), *Juhel v. Church* (2 John. Cas., 333), and *Buchanan v. Ocean Insurance Company* (6 Cow., 318), are supposed to have established the same rule in this State. No reason, that I am aware of, has ever been given for this

In consequence of this case, and others which followed it, Parliament was forced to interfere, as it did, by the act of 19 George II (ch. 37), reciting the mischiefs which had arisen from the making of marine insurances, "interest or no interest," and prohibiting them thereafter; and when the question subsequently arose in *Crauford v. Hunter* (*supra*), as to the validity at common law of a mere wagering policy upon a ship, it was held to be valid, solely upon the authority of the recitals in this act. It was in this indirect way that the doctrine in question, as to marine policies, first crept into the law. It was important to show this, because the effect of what I consider as the inadvertence of the court in *Depaba v. Ludlow* was not confined to policies upon ships. It must have been, I think, in consequence of the doctrine initiated by that case, that it came to be understood in England that, in insurances upon lives, it was not necessary at common law that the party to be benefited by the policy should have any interest in the life insured. There may not have been any direct decision to that effect; yet, that such was the prevalent impression, is to be inferred from the enactment of the statute of 14 George III (ch. 48), prohibiting insurances upon lives where the person insuring had no interest in the life. Angell, in speaking of this statute, says: "At common law it seemed to have been thought unnecessary that, at the time of effecting the policy, the assured should have had any interest which might be prejudiced by the happening of the event insured against." (Ang. on Life and Fire Ins., § 297.) In New Jersey they have no such statute; and the question now to be decided, therefore, is, whether the impression which seems to have prevailed in England prior to the statute of 14 George III was well founded.

That impression does not appear to be supported by any adjudged case. Life insurance seems not to have been practised to a great extent in England until a comparatively modern date, and the probability is, that as soon as such insurance became frequent, the evils of gambling in them was so apparent that Parliament interposed, upon the assumption

it should ever have existed. My conclusion, therefore, is, that the statute of 14 George III, avoiding wager policies upon lives was simply declaratory of the common law, and that all such policies would have been void, independently of that act.

It is said that the defendants, by issuing the policy upon the representation of the plaintiff that he had an interest, have admitted his interest, and that the production of the policy is at least *prima facie* evidence of such interest. This position cannot be sustained. All the older authorities show, that even in actions upon marine policies, not containing the clause "interest or no interest," it was necessary to aver, and of course to prove, the interest of the plaintiff. It is an indispensable part of the plaintiff's case, to be made out affirmatively at the trial. Upon this ground, therefore, as well as that before considered, the judgment of the Supreme Court must be reversed; and there must be a new trial, with costs to abide the event.

All the judges, except DAVIES and MASON, Js., concurred that the plaintiff must show an interest in the life insurance. On the question of evidence in respect to the prospectus being admissible as part of the policy or entering into the contract, COMSTOCK, Ch. J., DAVIES and JAMES, Js., dissented.

Judgment reversed, and new trial ordered.

PRUDENCE E. POWER v. LESTER.

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The marriage of a female mortgagee with the mortgagor, since the act for the protection of the rights of married women (ch. 200 of 1848), does not extinguish her right of action upon the mortgage.

Where such mortgagee unites with her husband in a junior mortgage of the same land, the act affects only her inchoate dower interest, but does not in the absence of words for that purpose impair her right to priority of lien.

It was a general rule of the common law that, where a man married a woman to whom he was indebted, the debt was thereby released. Thus, if the husband obligor took the obligee to wife, the bond was discharged at law, because husband and wife make but one person in law, which unity of persons disabled the wife from suing the husband. (Co. Litt., 264, b; 2 P. Will., 243; Bright on Husband and Wife, 18.)

Of late years material changes have been made in the law affecting the rights of husband and wife, both in this country and in England, and particularly in this State. The rule of the common law, which ignored the civil existence of the wife, and merged it, with all her rights, in that of the husband, has been modified or superseded. Modern legislation, in its march of reform, actuated by a wise and just policy, has, to some extent, swept away the despotism of the common law in this particular, and placed the wife, as to her separate estate, independent of the control of the husband, and declared her to have a separate legal existence and separate rights of action.

In this State, the Code and the acts of 1848 and 1849 have completely swept away the common-law rule which gave the husband rights in and control over the property of the wife. Now, every female, in respect to property owned by her at the time of marriage, continues its owner after marriage, with full power to use, control or dispose of it, in every particular, the same as if she had remained unmarried. Marriage no longer operates upon the property, but only upon the person: by it the estate of the female is no longer transferred to the husband, nor the right to use or control it. The statutes declare "that the property of any female who shall thereafter marry, and which she shall own at the time of marriage, shall continue her sole and separate estate, as if she were a single woman." This language is clear and explicit: it leaves no room for doubt or construction, and should receive at the hands of the court a faithful and fair application.

This plaintiff was not married until 1852, after the acts of 1848 and 1849; at the time she owned these bonds and mortgages—they were her separate estate, and the statutes declare

that such property shall continue her sole and separate property as if she were single. If single, no one would doubt her right to maintain this action. To hold that the marriage released the debt, would be to nullify the express language of the act. These statutes are inconsistent with the common law, and as both cannot stand, the latter must yield. The reason for the common-law rule, viz.: the unity of persons which disabled the wife from suing the husband, has also been repealed. (Code, § 114.) The wife has been admitted to separate rights of action as well as of property. Now a wife may maintain an action in her own name, concerning her separate estate against her husband or any other person. I am, therefore, of the opinion that these bonds and mortgages were not extinguished by reason of the intermarriage of the mortgagor and mortgagee, but that the wife may, notwithstanding, maintain an action in her own name for their foreclosure.

The second question is, did the mortgage to Lester operate to discharge or release the premises from the plaintiff's mortgage, or postpone it to the one to Lester. The execution and delivery of the mortgage to Lester did not pay the mortgage to the plaintiff; no consideration passed to her for the act; the defendant parted with no new consideration on its receipt—but took it as security for an antecedent debt due from the husband, and hence, no equity arises in behalf of the defendant against the wife, demanding that it operate as a discharge or release of the plaintiff's prior lien. Therefore, if the mortgage to Lester worked the release or discharge of the former mortgage, it must be upon some strict technical legal rule; it has no equitable basis to support it.

The effect of the mortgage to Lester, must be determined independent of any information of its probable effect communicated to the plaintiff before her execution of it; she doubtless executed the instrument with full knowledge of all the facts, and intended precisely what the law declares. It is apparent that the mortgage was not drawn or presented for execution with any intent of superseding the lien of her mortgage, because Lester had no knowledge of such mortgage;

and it is equally certain that she did not execute the mortgage for the purpose of superseding, discharging or releasing her lien, although she was willing to abide the legal consequences of the act.

As wife she had an inchoate right of dower in all the lands of which her husband was seised, the premises mortgaged to her, as well as the other lands mortgaged to Lester. The purpose of her joinder in the Lester mortgage undoubtedly was to extinguish that right; this is apparent from the instrument itself. She is therein described as wife: she acknowledges as wife: the terms used are the ordinary ones used in mortgages by husband and wife to bar the wife's dower; the mortgage covered many hundred acres not covered by the mortgage to her: it was without consideration on her part: it did not purport to affect her separate estate, or any lien or interest which she held in her own right; and it contained no words of release to operate upon a chose in action, or any words indicating an intent to operate upon her mortgage: therefore, if the plaintiff's interest as mortgagee could be released by joining her husband in a subsequent mortgage, it is apparent from the instrument itself that such was not the intent or understanding of the parties at the time it was executed, but that the sole object was to bar her inchoate right of dower.

A mortgage is a mere security, an incumbrance upon land. It gives the mortgagee no title or estate whatever. The mortgagor remains the owner, and may maintain trespass even against the mortgagee. (*Runyan v. Mersereau*, 11 John., 534; *Kortright v. Cady*, 21 N. Y., 347.) A mortgage is but a chattel interest: it may be assigned by delivery, and cannot be seized and sold on execution. (*Runyan v. Mersereau*, *supra*.) Therefore the plaintiff had no estate or interest in the land covered by the mortgage to her, other than her inchoate right of dower, susceptible of release or conveyance by deed or mortgage, and hence no other interest was released by the mortgage to Lester. The mortgage indeed pledged the land as security for the debt, and authorized its sale to make the money in case of default: nevertheless, the pledge was only

festly nothing in the language, and, we think, nothing in the general policy of this statute which will justify the discrimination suggested.

The plaintiff thus having a bond and mortgage which were in full force and effect, and her husband being the owner of the fee in the mortgaged premises, she joined with him in executing a mortgage to the defendant upon the same and other lands; and the remaining question is as to the effect of that transaction. A mortgage is not an estate in lands, but is a lien or security merely, which can have no existence separate and apart from the debt. (*Kortright v. Cady*, 21 N. Y., 347, and cases cited.) And from this it results, that, without a transfer of the debt, the lien or interest in the land is incapable of a sale or assignment. It is not true in this case, nor is it pretended, that the plaintiff intended to sell or pledge the debt which she held against her husband. If we regard her act, therefore, as in the nature of a sale, pledge or mortgage of her collateral interest in the land by which the debt was secured, the act was plainly ineffectual, and passed nothing either absolutely or conditionally. (*Jackson v. Willard*, 4 John., 41; *Aymar v. Bill*, 5 John. Ch., 570.)

The counsel for the appellant has referred us to the statute (1 R. S., 748, § 1), declaring that "every grant or devise of real estate, or of any interest therein, shall pass all the interest or estate of the grantor or devisor, unless the intention to pass a less estate shall appear by express terms, or be necessarily implied in the terms of such grant." The suggestion upon this statute is, that, in accordance with its terms, the mortgage in which the plaintiff united with her husband must be deemed to have passed all her interest conditionally to the defendant. But this is not so. The rule of the common law was, that conveyances and devises of land passed no more than a life estate, without express words of inheritance, or something equivalent thereto. This enactment was intended to abrogate that rule, and establish the opposite one. And clearly where, as in this case, the instrument, viewed as a grant or sale, absolute or conditional cannot, in the nature of the case, pass any

the party had. The argument would be forcible, because no other reason could be given for so uniting in the deed or mortgage. But the plaintiff was not thus situated. Her act was effectual as a release of her dower right in all the lands which the mortgage to the defendant embraced, and the instrument was in precisely the same form it would have taken had she possessed or claimed no other interest in the premises. And this, we think, is the true exposition of the transaction. The case of *Aymar v. Bill* (*supra*) is in point. There B and C united in a mortgage to A, covering two parcels of land. One of the parcels was owned by them jointly, they having bought it of A, and having given the mortgage for the purchase-money. The other parcel was owned by B alone; and he had given to C a prior mortgage upon it. The question was, whether C, by uniting in the mortgage upon both parcels, thereby released or in any way affected his own prior security upon one of them. The court held that his act was to be referred to the legal estate which he had in the other parcel. This construction, it was thought, gave a just and full operation to the instrument; and the first mortgage, therefore, retained its priority. The plaintiff in the present case is a married woman, and she is entitled to a construction certainly not less liberal. Having an inchoate legal estate in dower in all the lands affected by her husband's mortgage in which she joined, and the instrument being in the appropriate and usual form for incumbering that interest, we think we ought not to impute to her an intention of discharging the prior lien which she held as security for her husband's debt.

It has been said on the argument that the actual intention of the plaintiff, as proved by the oral evidence, was to cut off her mortgage by this transaction. To this it must be answered: 1. The evidence itself is indecisive on this point; 2. The intention must be ascertained from the writings and the contemporaneous facts, and not from conversations; 3. The judge who tried the case without a jury has not found that any such intention existed; and, if it were necessary to sustain his judg-

part of the court, nor is the prior case of *Aymar v. Bill* referred to; but the principle is stated as though it were one respecting which no question could be entertained. This being the last precedent, I should be inclined to follow it upon the mere ground of authority. But, in my opinion, it is the only aspect in which the subject is capable of being viewed, without wholly overlooking general principles universally recognized.

It is very familiar law that, if a party, seised of an estate of inheritance in land, is also entitled to a charge upon it, the charge will be extinguished unless he does some act for keeping it on foot, or unless it is for his interest to prevent a merger. Here, Lester, by force of the mortgage to him, united in himself the estate which Power had as general owner, and his charge or lien outstanding in the hands of Mrs. Power, the plaintiff. True, the interest thus conveyed to him was subject to be defeated by the performance of the condition contained in the mortgage; but, as between himself and his mortgagors, he was technically seised of the land. Lester had no possible motive for keeping the estate and the lien separate, and he did no act evincive of an intention to do so. They therefore merged.

The mortgage of Power and his wife to Lester does not contain express words of release, but it is a conveyance by grant, according to the Revised Statutes. Such a conveyance, in my opinion, has the effect formerly attributed to the different words usually contained in deeds of bargain and sale, and of lease and release. (2 R. S., pp. 738, 739, §§ 137, 138, 142; *id.*, p. 748, § 1.)

The fact that the plaintiff, when she executed the mortgage to Lester, was a married woman, makes no difference. By the act of 1848, before referred to, her real, as well as her personal property, was to continue her sole and separate property, notwithstanding her marriage, "as if she were a single female;" and, by that of 1849, she was made capable of conveying and devising property of both kinds, or any interest or estate therein in the same manner, and with the like effect as if she were unmarried. Having the general power to convey the whole fee or a less interest, there was nothing to prevent her

MANNING v. MONAGHAN *et al*23 539
118 149

It is a mis-trial where no general verdict being rendered, the answers of the jury to specific questions, not covering the whole case like a special verdict, are taken and referred to the court at general term for judgment upon the answers, and the questions of law arising in the case.

It seems that a mortgagee of chattels may maintain an action for the damage to his reversionary interest caused by a sale in parcels, under execution against the mortgagor while in possession.

Whether a purchaser of part of the chattels may be joined as defendant with the parties who made and directed the sale. *Quære.*

A mortgagee of chattels, which have been purchased from the mortgagor within a year after the filing of the mortgage, may, *it seems*, demand and recover them from the purchaser after the expiration of the year, although he has not re-filed the mortgage.

APPEAL from the Superior Court of the city of New York. The action was brought to recover damages on account of the seizure and sale of certain household furniture, which one Schenck had mortgaged to the plaintiff. The mortgage was given to secure \$1,070, payable in one year, with a provision that until default, the mortgagor should continue in the full possession and enjoyment of the goods. Within the year the defendant, Monaghan, recovered a judgment against Schenck, and on the execution being returned unsatisfied, he instituted proceedings supplementary to the execution, which resulted in the appointment of the defendant Cavanagh, as receiver. He took the goods, and caused them to be sold at auction. Gosling, the remaining defendant, purchased a portion of the goods at the sale. The case was tried by jury. The counsel for the defendants, Monaghan and Cavanagh, submitted twenty-five several requests for instructions to be given to the jury, but to each request the judge responded by a refusal, and the defendants' counsel in each instance excepted. The judge then stated that he should submit to the jury questions in writing, requesting an answer to all the disputed facts, and therefore no charge would be necessary except such as was proper to

ordered that the plaintiff recover \$1,070, against the defendants, Monaghan and Cavanagh, with interest from the time the mortgage debt became due; and that as to Gosling, the complaint should be dismissed, with costs, to be paid by the plaintiff.

The plaintiff made a case in order to procure a reversal of the judgment against them in favor of Gosling, and there was a case made on behalf of the defendants, Monaghan and Cavanagh; and there were appeals to this court by the plaintiff and by the last-mentioned defendants from the judgments against them respectively.

Amasa J. Parker, for the plaintiff.

Francis Byrne, for the defendants.

DENIO, J. I am of opinion that the judgment of the Superior Court should be reversed, on the ground that the case has not been tried in the manner contemplated by the law regulating the practice of the court. It will be perceived that, although there was a jury trial, there was no verdict of the jury, general or special. That there was not a general verdict is manifest, for the jury were not allowed to say whether the plaintiff should recover or not. In a general verdict the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. (Code, § 260.) A special verdict is that by which the jury find the facts only, leaving the judgment to the court. (Id.) This is also the definition of a special verdict at the common law. It must contain all the facts essential to the rendering of a judgment one way or the other; but the answers of the jury in this case embrace only a small portion of the facts necessary to a judgment. The execution of the mortgage, and its terms, which constituted the plaintiff's title, are not mentioned, nor is there any allusion to the defendants' judgment, or the appointment of a receiver, upon which the defence was based. The judge only submitted such questions of fact as appeared to him to be disputable. This is authorized by section 260 of the Code. but only in connection with a

and then ordering the case to the general term. It is only to a case which does not involve both classes of questions, and which does not require the two methods of trial, that the provision applies. Besides, where an order is made under either of these branches of the Code, there must be a general verdict. A case of legal, as distinguished from equitable, cognizance, cannot be sent to the general term, like a Chancery case under the former practice, with the testimony and the verdict upon the feigned issues to be considered in connection with the equity arising upon the undisputed facts. The Code has not essentially changed the nature of a jury-trial in a common-law case. If there are questions of law and of fact, the judge must determine the former as they arise, and leave the others to the jury, who may find a general or special verdict, as they see fit. If the judge deems it expedient, for the purpose of an expected review, to have a special finding upon particular propositions, he may give appropriate directions for that purpose; or, if there are no questions except legal ones, as where the matter depends upon the construction or the effect of a written instrument, and the like, the jury may be peremptorily instructed to give a verdict one way or the other, subject to the opinion of the court at a general term, and the parties be directed to apply there for judgment; or he may leave the party against whom the decision is to move for a new trial on a case and exceptions in the ordinary course of justice.

We have frequently had occasion to state these rules, and have several times reversed judgments for want of conformity to them. Two cases of this kind are reported: *Cobb v. Cornish* (16 N. Y., 602); *Gilbert v. Beach* (id., 606); and the same course has been taken in a good many unreported cases. In one of them (*Clew v. McPherson*), decided at the September term, last year, all the disputed questions had been determined in the manner adopted in this case—by taking the answers of the jury to special interrogatories; and the judge then directed the questions of law to be heard in the first instance at the general term, and that judgment should be there applied for. The case falling to me to write on, I considered the ques-

lien, is a lawful act, whether done by the mortgagor himself, by the sheriff on execution against him, or by a receiver who has acquired his interest in the property. If such sale by either of them be made in hostility to the mortgage, and the attempt is made, although unsuccessfully, to pass an unincumbered title, then the act is so far wrongful. Nevertheless, it is a wrong without damage, if nothing is done to place the property beyond the reach of the mortgagee, or to prevent him from taking possession when his right of possession accrues. This court has determined that an action in the nature of trespass or trover, will not lie in such a case. (*Hull v. Carnley*, 1 Kern., 501; 17 N. Y., 202; *Goelet v. Asseler*, 22 N. Y., 225.) Those forms of action depend on possession or the right of possession at the time of the alleged trespass. The title of a mortgagee of chattels is reversionary, so long as the mortgagor has the right of possession. Injuries to reversionary interests were always redressed by a special action in the case. But to maintain that action, or one of that nature, a special injury must be shown. If the wrongful act be proved, and the special injury appears, then I am of opinion that the law affords a remedy.

In this case there was no right to sell the interest of the plaintiff, because the receivership of Cavanagh extended only to that of the mortgagor. He proceeded, however, to sell not only in defiance of the mortgage, but at auction, in different parcels and to various purchasers whose very names, so far as appears, are unknown. In the language of the printed case, it was proved that the defendants, Cavanagh and Monaghan, "placed the goods in an auction store," in New York, and had them sold "to divers persons without any notice or recognition of the plaintiff's mortgage or claims, but treating the same as a nullity." It may be assumed that the auction was attended by a miscellaneous crowd; that the various purchasers bought in good faith; that each of them removed the article or articles purchased by him; and that the property became lost to the plaintiff, because the parcels were scattered and their situation unknown when his right of possession accrued. It appears

of the mortgage is consequently good for nothing. Will it be said that here are not injury as well as wrong to the mortgage creditor? And who in a just sense, are the authors of the injury? Is it the persons who have innocently consumed the property, or those who sold it to them with the assertion, express or implied, that the title was perfect, knowing that assertion to be false, and having no right to make such a sale?

Again, suppose the mortgage is upon a span of horses and a pleasure carriage. The execution creditor of the mortgagor directs them to be levied on and sold in hostility to the lien, affirming the title to be perfect and knowing that the purchaser intends to take the property to the State of Georgia. Has the mortgagee in such a case no remedy except to follow the chattels and demand them in a distant state or country? It seems to me plain, that he may consider the value of the lien as practically destroyed, and seek his redress against the author of the injury.

For every wrong attended with loss and damage, the law affords a remedy. The existence of a mortgage upon personal estate may not prevent creditors from seizing and selling it to satisfy their just demands. But an attempt to sell in contravention of the lien, is an attempt to do a wrong and inflict a loss. An actual injury may or may not result, according to the circumstances. If it does result, the logical consequence is, that an action will lie founded on the special facts. It proves nothing to cite cases where the right to maintain trespass or trover has been denied. These forms of action were never designed to redress wrongs of this character.

The true principles of the question are well illustrated in the case of *Van Pelt v. McGraw*, determined by this court. (4 Comst., 110.) There a mortgagee of lands brought a special action on the case against the grantee of the mortgagor, for an injury to the lien. The defendant, with knowledge of the mortgage and of the insolvency of the mortgagor, had removed fences, and cut and carried away valuable timber. It was contended that as owner of the land he had a right so to do, and the general

perty thus situated should be sold in mass, and subject to the lien. If sold otherwise, if it is scattered and dispersed, the proceeding is both a wrong and an injury, provided the mortgagor is insolvent, and the debt to the mortgagee is not otherwise secured. For such an injury an action will lie.

I find, therefore, no reason to doubt that, upon the facts of this case, as the jury found them, the plaintiff can maintain his suit, founded on the special circumstances of the seizure and sale of the property in question. There is, however, a difficulty in maintaining the judgment which has been rendered against Monaghan and Cavanagh for the whole amount of the plaintiff's demand against Schenck, the mortgagor. On comparing the schedules of the property mortgaged and of that sold at the auction, it appears that some of the articles which the mortgage included were not taken or sold. But the number and value of these it is impossible to tell, from anything contained in the case. At the trial, in addition to the special questions left to the jury, these defendants requested the following, among others, to be submitted: "Was any property specified in the mortgage not taken by the receiver, and what articles of property? What was the value of the same?" The judge refused to submit these inquiries, and directed the jury to find, among other things, the value of the mortgaged property actually taken and sold. That value being found, and being equal to the plaintiff's debt, judgment was given accordingly. I think it was error thus to allow a verdict to be taken, and to render judgment upon it, without any regard to the property left in possession of the mortgagor. If the articles not interfered with were amply sufficient to satisfy the mortgage, it is impossible to say that the plaintiff sustained any injury at all. If they were partly sufficient, then the residue of his debt was the extent of his loss. It is true that the effect of a chattel mortgage, after forfeiture, is to give a title to the mortgagee which is called perfect at law. But even then an equity of redemption is left in the mortgagor, or those who succeed to his rights. In equity, the mortgagee is only entitled to his debt; and where a creditor has

statute is, that, if the mortgage be ~~not~~ renewed in the manner prescribed, and if the possession, after the year, still continues in the mortgagor, a subsequent purchaser in good faith will acquire a superior title. A purchaser who has bought during the year, in other words at a time when he cannot impeach the mortgage, and has thereupon himself taken the possession, is clearly not within the protection of the act.

Gosling therefore acquired no title to the property which he purchased, as against the plaintiff, if the mortgage of the latter was free from fraud, as the jury found. He nevertheless bought in good faith at the auction; and the sale, as we have seen, was also a rightful act, apart from the special circumstances tending to injure the plaintiff's lien. These circumstances, moreover, are to be imputed wholly to the defendants Monaghan and Cavanagh, who concealed the existence of the mortgage from the purchasers, and sold in hostility to it. Gosling clearly acquired a title to the articles which he purchased, subordinate to the mortgage, and he ought not in equity to be accountable if the plaintiff can collect his debt either out of the property not taken at all or from Monaghan and Cavanagh. Those two defendants should be deemed primarily liable in respect to all the property sold, because the injury to the plaintiff is the direct consequence of their proceedings, and because they received the price which the property produced. A proper adjustment of the rights of all the parties, I think, would be this: The plaintiff is entitled to compensation for his loss, a just regard being had to the value of any security which has not been disturbed. The defendants, Monaghan and Cavanagh, are liable to the extent of such loss for the value of all the mortgaged property which they caused to be seized and sold. Gosling is also liable for the value of the articles purchased by him; but any judgment to be recovered against him should be so rendered as to be auxiliary only to the collection of the amount recovered against the other defendants. Some of my brethren, however, think there is a misjoinder of defendants, and that on another trial the plaintiff must elect to abandon his suit either against Gosling or the other defendants. Perhaps they

if the defendant was liable, was admitted to be \$62.70. The plaintiff had established a toll-gate, and had a keeper stationed at it, but the defendant drove through without paying toll, claiming that the road was out of repair. The gate-keeper was aware that the defendant was passing the gate, and did not do anything to prevent him. The plaintiff recovered the above amount with interest, and the defendant appealed. The case was submitted on printed points.

William Porter, for the appellant.

C. W. Swift, for the respondent.

DENIO, J. There is no force in the objection that a formal promise by the defendant to pay the amount alleged to be due from him for tolls, is not stated in the complaint. In pleading under the Code, it is sufficient to state the facts from which the law infers a liability, or implies a promise. If the defendant is legally liable for these tolls on account of having used the road, an action of debt would have lain at common law upon a statement of the facts creating the liability, without the averment of a promise.

The only question of any moment in this case is, whether the remedy given by the statute for enforcing the payment of the toll is not exclusive. The general plankroad act declares that the companies "may demand and receive toll" according to the rates there specified (Laws of 1847, p. 226, § 36); and the thirty-fifth section of the title of the Revised Statutes concerning turnpikes, which is adopted by the plankroad act, provides that the toll-gatherers may detain and prevent from passing through their gates, persons driving carriages subject to toll, until they shall have paid the tolls. (1 R. S., 584; Laws of 1847, p. 231, § 47.) The defendant maintains that this right to prevent the passage of the carriage, by keeping the gate closed, is the only remedy which exists for tolls, and, consequently, that his action will not lie. The principle alluded to, is thus stated by Lord MANSFIELD: "where a statute

the statute; "for disobedience of an order of sessions," he said, "is an offence indictable at common law. Here the relief is to be assessed and directed by order of sessions, and a particular proceeding in a summary way is prescribed by the act as a particular sanction and method of punishment. But it is to be presumed that the legislature then knew and considered that disobedience to an order of sessions was an offence indictable at common law. So that they must have intended that there should be, and there actually are, two remedies in the present case; one to proceed by way of indictment for disobeying the order where the weekly payment is neglected or refused to be made; the other, to distrain for the 20s. penalty after the expiration of the month." In the present case, it is fair to presume that it was within the contemplation of the legislature that the common law furnished an action of debt for these tolls, and that they designed to superadd to that, the right, if they chose to enforce it, of hindering a traveler from pursuing his journey until he should pay the sum which the company was authorized to demand for the use of the road.

The case of *Almy v. Harris*, just referred to, also proceeded upon the same distinction. The plaintiff was the proprietor of a ferry, granted to him by a Court of Common Pleas, pursuant to a statute, which also prohibited the setting up of a ferry by others without a license, for the transporting of persons or property across a river under a penalty of five dollars. The action was for disturbing the plaintiff in the use of the ferry, and it was held that the plaintiff could not recover because the right was derived wholly from the statute, and the penalty was the only remedy for punishing intruders. The distinction between that case and the present consists in this, that a turnpike or plankroad company are obliged to acquire the possession of land and to prepare it for use as a road, and that the common law annexes to such proprietorship the usual common-law remedies; whereas in the case of a ferry there is no material property possessed by the owner of the franchise, the whole right existing in the authority given by statute.

Though equity may enforce specific performance of an agreement to make a mortgage, it will not give to an executed agreement of the parties contemplating no further act by either, any different effect than that which the law attributes; nor will it reform the writing to make an agreement of a different effect from that which the parties intentionally entered into.

Money was advanced upon the security of a mortgage with a parol agreement that further advances should be made: that the amount thereof should be inserted in the bond, and that the mortgage should be considered as security for what should thus be inserted. After the mortgage was recorded, a further advance was made and the amount inserted in the bond: *Held*, that the mortgage could not be extended to cover such subsequent advance even as against a grantee of the premises who took them for a precedent debt, and with full notice of all the facts.

APPEAL from the Supreme Court. The action was to restrain the foreclosure by advertisement, and to compel the cancellation, of a mortgage held by the appellant against one Spicer. The trial was before a referee, who found these facts: On the 4th of March, 1852, Spicer procured from the defendant, on the security of the bond and mortgage in question, an advance of \$200 on lumber to be thereafter furnished. The mortgage was recorded on the 8th of March, 1852.

The original condition of the bond and mortgage was for the payment of \$200 and interest on the 15th of June, 1852.

At the time the \$200 was advanced, it was agreed between the parties that if Spicer should want more money, the defendant would advance it, and for the purpose of securing it, the amount of such further advance should be inserted in the bond, with the parol agreement that the mortgage should be considered as security for what was thus inserted.

Accordingly, within ten days after the mortgage was given, Spicer applied for and obtained from the defendant a further advance of \$180, inserting at the same time in the bond a further condition for the payment of that amount, with interest, on the 1st of June, 1852.

The mortgage, which had been in the meantime recorded, was conditioned for the payment of \$200 and interest, with the additional clause—*"according to the condition of a certain bond obligatory bearing even date herewith."*

condition of the bond, is to be deemed actually incorporated in the condition of the mortgage also, so as to render the latter a legal security for both the sums in question. / This proposition does not require, nor does it admit, any aid from the understanding of the parties derived from the extrinsic evidence. If it be a sound one, it is universally sound; so that, if a bond be given for \$2,000 actually loaned, and a mortgage collateral thereto be given for \$1,000, the latter is always to be read and construed as a security for the larger sum. The instrument being legally perfect, there is no occasion to reform it, or to involve the doctrine of equitable lien, of specific performance, or any kindred doctrine of equity.

I think this proposition cannot be maintained. A bond and mortgage are two instruments, although one may be collateral to the other. The one is a personal obligation for the debt: the other creates a lien upon land for the security of that debt, and it may well be for a portion of the debt instead of the whole. If the personal obligation expresses two sums, and the collateral instrument expresses only one of them, I see no reason why each should not be construed according to its own terms. / So, if the condition of a bond be for a larger, and that of the mortgage be for a smaller sum, the obvious effect of both the instruments is that the maker binds himself generally for the whole debt, while he specially pledges the mortgaged land for only a given part of it. In this case the written condition of the bond is to pay \$200, and the further sum of \$180; while that of the mortgage is only to pay the \$200. Each instrument is perfect, and each admits of a plain construction and effect according to its own language. If we do not look outside of them, there is no ambiguity. A debt was created, consisting of two sums. The land was mortgaged for one of those sums only.

In the next place, if the doctrine were admitted that a mortgage passes the freehold or legal estate in lands, it would probably follow that a parol agreement that the security should stand for a new advance would be good against the mortgagee or any one claiming under him not having the rights of *bona*

admitted by English jurists that this doctrine contravenes the statute of frauds, although it has become well settled in the jurisprudence of that country. (4 Kent Com., 151.) It is confined there to the precise case of a deposit of title deeds. A mere parol agreement to make a mortgage, or to deposit deeds, does not create an equitable lien. In this State the doctrine is almost unknown, because we have no practice of creating liens in this manner. Equity, however, here as well as there, does sometimes specifically enforce parol agreements which are within the statute of frauds; and I see no reason to doubt that such an agreement to make a mortgage may be enforced when money or value has been parted with on the faith of it, and the circumstances are such as to render it inequitable to refuse the relief. But, in the present case, the precise difficulty is in the absence of any such agreement. The defendant had loaned \$200, and held a mortgage for that amount. He then advanced another sum; but there was no agreement to make another mortgage, or to change, in any respect, the terms of the one already made. The additional sum was inserted in the bond, with an understanding thereby that the mortgage should be "considered" as a security for that sum also. The instrument, as it was made, was a plain security for \$200; and no change in its terms was contemplated. Nor is there the least pretence that any writing was to be executed creating a special security for the new advance. Now, a loan of money, with a mere understanding that the land of the borrower is a security for the debt, does not create a mortgage, legal or equitable. If it be specifically agreed to execute a legal mortgage, a very different question arises. The deposit of title deeds is evidence of such an agreement. But here there was no agreement to do anything which was not actually done. Consequently, if enough was not done to create a mortgage, then none was created. There is no room for the doctrine of specific performance, because there is nothing unperformed. The parties may have misunderstood the effect of what they did; but nothing in the transaction was left unfinished of which equity can now decree the complete ex-

rule on the subject, especially if the relief sought be in direct opposition to the statute of frauds. In the case of *Hunt v. Rousmaniere's Executors* (1 Peters, 1), the general intention of the parties was to effect a security upon a ship at sea equivalent to a mortgage or bill of sale. With that design, a power of attorney to sell was executed, which, as they understood and were advised, accomplished the object in view. As a power merely, the instrument was revoked by the death of the party who signed it, and a bill was filed to reform the writing so that it might stand as a security according to the intention. It was adjudged, in the Supreme Court of the United States, upon the fullest consideration, that the bill could not be maintained — the ground of decision being that the court could not make an agreement of a different tenor and effect from the one which the parties themselves had intentionally entered into. The case before us seems to me still weaker in its circumstances, because not only was there no agreement for a better security than the defendant actually received, but it does not even appear that he acted under any mistake as to the legal effect of the transaction. The new advance of money was inserted in the bond; but there is no pretence of a belief that this, in any respect, affected the mortgage. There was a parol agreement that the mortgage should be considered as a security also for the sum thus inserted. The other party might give effect to this agreement in any suit or proceeding against him to foreclose, if he voluntarily chose to do so. But it is not alleged that, under a mistake even of the law, this agreement was supposed to be of any binding force or effect. On the whole, I am of opinion that the defendant's lien, whether viewed at law or equity, was only for the original sum of \$200, and, consequently, that the judgment of the court below is right.

DAVIES and MASON, Js., dissented; HOYT, J., did not sit in the case.

Judgment affirmed.

with the defendant's approval, to correspond with the number of such policy. The plaintiff claimed to recover the whole amount specified in the note, without any assessment for losses, none being averred.

Upon the trial before a referee, it appeared that the defendant made an application, in writing, for insurance upon a house, some time previous to the organization of the company, to Mann, an agent appointed to receive such applications, who testified that he informed the defendant's agent, one Knowlton, that the company was not then so organized as to issue policies though receiving applications therefor. One of the officers of the company testified that the note was presented to the commissioners who examined its securities, and was treated by them as a part of the capital necessary to enable it to commence the business of insurance. There was evidence tending to make it doubtful whether the defendant was apprised that the company was not fully organized at the time when he made the note. The referee reported in favor of the plaintiff. Upon appeal the court at general term in the fifth district ordered a new trial, certifying that it was granted on questions of fact, as well as of law, and the plaintiff appealed to this court, stipulating for judgment final against him in case the order for a new trial should be affirmed. The cause was submitted on printed arguments.

Francis Kernan, for the appellant.

Porter & Wallace, for the respondent.

SELDEN, J. It appears from the judgment from which this appeal was taken, that the judgment entered at special term upon the report of the referee was reversed upon questions of fact as well as of law. It becomes the duty of this court, therefore, under the recent statute amending the Code of Procedure, to review the case, with reference to errors both of law and of fact.

The main question in the case is, whether the note upon which the action is brought belongs to the class of notes pro-

No objection was made to the admissibility of this evidence, and none, I think, could have been sustained if made. Although the terms of the note do not conform to the provisions of the act, they are not necessarily in conflict with it. If, therefore, the evidence in this case was sufficient to establish the facts which was admitted in the case of *White v. Haight*, the conclusion arrived at in that case would be decisive of this. The referee thought the evidence sufficient and held the defendant liable. The court at general term thought otherwise, and reversed the judgment. It now devolves upon this court to settle this controverted question of fact.

The referee appears to have found the fact in question upon the testimony of Silas Mann, the agent of the plaintiff, who received the defendant's application and note and forwarded them to the company: and of E. J. Richardson, one of the officers of the company. Mr. Mann says that when he received the application from Mr. Knowlton, the agent of the defendant, he informed Knowlton that the company was not then organized but would be in a short time, and Mr. Richardson, testified that the note of the defendant was one of the notes presented to the commissioners, and which went to make up the one hundred thousand dollars of capital, which the company was required to have previous to commencing its business.

This evidence could scarcely be regarded as sufficient to establish the fact in controversy, even if entirely unopposed. It does not appear that the defendant was in any manner cognizant, either personally or through his agent, of the fact that the note in question was presented to the commissioners as part of the one hundred thousand dollars. That fact, therefore, can have but little, if any, weight in the case. It does not tend to show that the note was given for the purpose of being so used. Hence, the finding must rest mainly, if not exclusively, upon the testimony of Mr. Mann, that he informed the defendant's agent that the company was not yet organized. But this, if true, does not prove that the note was given as a part of the preliminary capital. The defendant, wishing to

such inference. It purports to be given, not in consideration of an obligation on the part of the company to insure from time to time until the cash premiums should be sufficient to repay the amount of the note, but of a single specific policy, to be issued, as appears from the application which accompanied the note, for the insurance of a single block of stores, valued at \$2,000, the premium upon which, to be paid in hand, was only \$9.60. Again, the note was not made payable absolutely, nor at any specific time, but "in such portions and at such time or times as the directors" might, agreeably to their charter, require.

These features characterize the note so strongly, as one intended merely as an ordinary guaranty note, subject only to assessment for losses, that nothing short of the most conclusive evidence, or of an express admission as in the case of *White v. Haight*, could be sufficient to establish the fact that it was intended as a note of the other class. There is clearly no such evidence in this case. The testimony is even conflicting upon the question whether Knowlton, the agent who made the arrangement for the defendant, was apprized at all that the company was still unorganized; and that is the only fact that has any tendency to meet the inference to be drawn from the terms of the note. My conclusion therefore is, that the general term was right in reversing the judgment of the special term and ordering a new trial. The defendant is, therefore, entitled to final judgment, pursuant to the stipulation of the plaintiff.

All the judges concurring,

Order granting new trial affirmed, with costs, and judgment absolute for defendant.

BY THE COURT—LOTT, J. We are of opinion that the instruments on which the action was brought were negotiable, and that the defendant was properly held liable as an indorser thereon. They were made by the city of Milwaukee, and are in the form of bills drawn by its mayor on its treasurer, attested by its clerk and countersigned by its comptroller, and directing the treasurer to pay to the order of the defendant certain sums therein specified, with interest, "out of any funds belonging to the city not before specially appropriated," and then it is added that the same were on the date thereof allowed for dredging, and chargeable to the general city fund.

It is claimed by the defendant that the payment depended on the condition of the funds at the time they became due, and that the city would not be bound to pay them unless there was sufficient moneys in the city treasury at that time, not specially appropriated, to meet the demand. Such is not their meaning. An indebtedness to the amount specified is acknowledged, and it is stated for what it has been incurred, and on what fund it is chargeable, and although it directs the treasurer to pay the amounts "out of any funds belonging to the city not before specially appropriated," no inference can be drawn from this direction that it is chargeable and payable out of any particular or specified fund; on the contrary such an inference is repelled. The financial officer of the city is, in effect, directed that he shall not pay the amount out of any specific moneys appropriated and set apart to other objects, but that he must make the payment out of the general funds of the city, and charge the general city fund therewith in his accounts. It is not contemplated that there will be a deficiency of funds

the defendants was a general denial of each and every allegation in the complaint.

After the issue was so joined, the cause was regularly removed into the Court of Common Pleas in and for the city and county of New York, under the provisions of the act entitled "An act to reduce the several acts relating to the District Courts in the city of New York into one act," passed April 13th, 1857. (Chap. 344, Laws of 1857.)

After the cause was so removed it was referred, by an order of the Court of Common Pleas, to William Bloomfield, Esq., to hear, try and determine the issues therein; he found in favor of the plaintiff, and directed judgment for \$196.20 besides costs. A judgment was thereupon entered on the first day of October, 1860, which, on appeal, was affirmed by the general term of the Court of Common Pleas, by an order duly made and entered on the 27th day of February, 1861, and on the same day the defendants appealed to this court without any order allowing such appeal.

A motion is now made to dismiss the appeal on the ground that such order was not obtained; and the question presented, is, whether the appeal without it is valid.

It is provided by section 11 of the Code, as amended in 1857 (Chap. 723, of the Laws of that year, § 1), that an appeal to this court shall not be allowed in an action originally commenced in a Court of a Justice of the Peace, or in the Marine Court of the City of New York, or in an Assistant Justice's Court [now District Court] of that city, or in a Justice's Court of any of the cities of this State, unless the general term of the Court, by which the judgment sought to be reviewed was rendered, shall by order duly entered allow such appeal before the end of the next term after which such judgment was entered; but this prohibition is declared not to extend to actions discontinued before a justice of the peace, and prosecuted in another court, pursuant to sections 60 and 68 of the Code.

The actions embraced within that prohibition are those where there is a discontinuance upon an answer interposed

APPENDIX.

BECKMAN, Administrator, &c., v. BONSOR, the People *et al.*

THE following is a *verbatim* report, by a phonographer, of the argument of WILLIAM CURTIS NOYES, in this case (ante, p. 298). It contains so elaborate a collection of the authorities relating to the history of the doctrine of charitable uses—some of them rare and out of print—that the Reporter believes himself to be rendering an acceptable service to the profession in giving it greater perpetuity and diffusion, than a pamphlet could attain.

The very able arguments of the other eminent counsel in this case, necessarily suffer the common fate that attends winged words, however weighty or eloquent, when no phonographer is present. It would do injustice to those gentlemen to present their arguments in the skeleton nakedness of the printed points.

Mr. NOYES said :

If your Honors please—A brief reference to the situation of the parties litigating in this case, will be all the introduction I shall make to the legal questions I propose to present to the court. There is really, as between the parties other than the State, no substantial difference of interest. The Bonsors, if the property is to be regarded as personal estate, will take the one-half of it as next of kin, and Mrs. Barthrop the widow, will take the other half, so that, although there is an apparent antagonism between the representatives of Mrs. Barthrop, and the Messrs. Beekman and the Bonsors, in respect of the farm that was to be provided for the latter in this country, yet in reality, the annihilation of that provision which has been effected

"I will that my executors purchase a farm in trust for the benefit of my nephews and nieces, children of my sister Mary Bonsor, of Nottinghamshire, in England, not exceeding six thousand dollars, as an *asylum*."

Mark the phrase! A sort of semi-public charitable institution for his own family — the descendants of a sister!

"And it is my wish they come and occupy the same, especially my nephew Henry, but my executors must have full power over the same for fifteen years, for the benefit of all my nephews and nieces as they think fit, and after the fifteen years is expired, they may sell the same and apportion the avails among them, or their heirs or survivors, as they think just, and if any of my nephews and nieces cavil or dispute with the arrangements my executors make for their mutual benefit, I will that they receive no part thereof."

So that the executors were appointed a committee to manage these unknown people when they came, and if they were not satisfied with the means adopted for that purpose, they were to be cut off from all participation in this bounty. Consider this for a moment in connection with the residuary clause. He gives, after satisfying all the provisions of his will in regard to the dispensary, the residue to his executors in trust,

— "to pay and apply the same in such sums, and at such time and times as in their discretion they shall think fit and proper, to the treasurer or other officer having the management of the pecuniary affairs of any one or more societies for the support of indigent respectable persons, especially females and orphans, and for the use of said society or societies, hereby intending to give to my executors full discretionary power as to the disposition of the same, but so as that the same shall be applied to objects of charity."

It is not said whether these societies shall be incorporated, or not; but before his relations can receive the benefit of the six thousand dollars, they are to occupy this domestic "*asylum*," under the management of his executors. And before they can reap one particle of benefit under this residuary clause, they are to become, in addition to this unfortunate and unhappy condition in a private asylum, *corporate paupers*! If they should connect themselves with any association of that sort — a refuge for pauperism — they could receive its benefits, and not otherwise.

If the court please, a will which contains such provisions — and I do not say this for the purpose of reflecting on the memory of the testator — a will which contains such provisions as this in relation to the blood relations of a man, should not stand, unless there be some

There is no obligation on the executors to apply the rents and profits. And then, if they cavil, they are to be cut off.

I say, in the next place, nor could the title vest in them under §§ 47, 48 and 49, inasmuch as the devise of "any interest" to them was forbidden by the statute cited, and the trust was also void.

Again, equity would not raise a resulting trust in their favor, in fraud of the rights of the State, or the law of the land; and, clearly, an estate or interest would not vest in them under these sections, in fraud of the statute cited. (*Leggett v. Dubois*, 5 Paige, 114; *Hubbard v. Goodwin*, 3 Leigh, 492; 2 Kent's Com., 62, note.) That devise could not be made to an alien. A resulting trust never arises in favor of an alien. It never arises in any matter involving an illegality; and in this case, therefore, there would not be a resulting trust.

My next proposition is, that the devise and bequest in the first codicil for "a public dispensary as in New York, on a similar plan, for *indigent* persons, both sick and lame, to be attended by a physician *elected* to the *establishment*, at their own homes, and also daily at the dispensary, * * * and funds enough to *carry on the building*, and yearly expenses," was illegal and void, because it seeks to create a trust in lands and personal property contrary to the Revised Statutes.

If valid, the direction would be imperative, and would require the purchase of land, and the erection of buildings upon it for a dispensary. It demands an "establishment," which is something "settled firmly," or "instituted for public or private uses," and also a "building;" both involving a substantial and permanent edifice, or structure erected on land.

"A dispensary as in New York —." Where they are public edifices, used as dispensaries, "——— on a similar plan, for indigent persons, both sick and lame, to be attended by a physician elected to the establishment, at their own homes, and also daily at the dispensary; my executors to consult judicious men in Albany respecting the same, and funds enough to carry on the building and yearly expenses."

The association of these terms, it seems to me, shows that the testator contemplated the carrying on of the dispensary after the edifice to be used for that purpose was erected. Now Boyle says (p. 90) that—

"Where money is bequeathed for the purpose either of 'erecting' or 'building' an infirmary or school, or other charitable institution, without saying upon what lands, the courts have, for some time past,

But even if the bequest would be satisfied by hiring house and lands, still the rule would be the same. My seemed to think that that would authorize a distinction not be, as it must be a hiring or leasing continuously or so as to be as unlimited in duration as the dispensary itself would not be an answer to say, you can hire for a year another year, and so on. It presupposes the necessary possession of real estate, commensurate with the trust, and Highmore on Mortmain (p. 226) contains the even such a devise is void.

I say, in addition, then, under this proposition, the transgression of the Revised Statutes in regard to use inasmuch as, in order to carry the testator's intention requires the creation of some organized legal existence of indefinite duration, to receive and hold the title to the things necessary for the dispensary, and to the funds which to pay the salary or compensation to the "elects of the establishment," and the incidental expenses, and the same from time to time in perpetuity. Now, if such not been created by the will, or if the authority, in express not been conferred upon this court, or upon some other body authorized to create them, then they must be in the virtue of some inherent power in the Court, or in some other body to do the same thing; and I say this can only be done by creating a corporation, or by the appointment of trustees to some other tribunal, or a legislative body, authorized to appoint them.

Now I need not say it is no part of the power of Chancery to appoint trustees *de novo* of anything. If trustees that have been appointed by some legal means in a Court of Equity to appoint trustees of a fund which trustees — has no existence. It is, in effect, the creation of a new trust. Trustees unlimited in duration, or capable of unlimited duration by means of a new creation as often as there is a vacancy in a corporation. They have a continuous existence. The Court of Chancery has no power, inherently or by appointment, to appoint trustees to anything, where trustees have never before.

I say, in the next place, a corporation to execute a trust can only be created by the Legislature. The Court of Chancery in the exercise of its ordinary jurisdiction, has no power

Hence, it is entirely clear, that the jurisdiction ceeds upon the basis of the appointment of a trustee for creating the charitable use. And then he says :

"All the persons beneficially interested, must file the suit for the appointment of a new trustee."

I will now consider the reference to Boyle on this point. He says :

"It is a point perfectly well settled, that where a gift is made to charity generally and indefinitely, without trustees or a trustee, the king, as *parens patriæ*, is the constitutional trustee. In this hand, it is equally clear, as has been stated under the Statute, that in order to give jurisdiction to the Court of Chancery, it is absolutely necessary that there should have been an appointment of at least an intended appointment of trustees."

I have referred also to *Moggridge v. Thackwell*, which is a leading case on the subject. Lord ELDON says :

"The general principle most reconcilable with the Statute, where there is a general indefinite purpose, not fixing a definite object, the disposition is in the king by sign-manual, and the execution is to be by a trustee, with general or some other power, and then the court will take the administration of the trust."

Lord ELDON, in the liberality with which he regards the Statute, maintaining that the Court of Chancery has jurisdiction where a trustee has been appointed.

In another case, which I believe has not been reported, *Paice v. The Archbishop of Canterbury* (14 Ves., 380), purporting to follow this distinction, says :

"Where the bequest is to trustees for charitable purposes, the position must be by *scheme* before the master ; but if the gift is charity, without a trust interposed, it must be by sign-manual."

Here, where there were no trustees, the court held that the gift was by adoption of a scheme. Boyle (p. 241), in summary, says :

"It may therefore be considered, that however large the gift may be, provided it is strictly charitable and not mixed up with general purposes, the disposition is in effect *ex-parte*, either by the Court or the King, as there has or has not been an interposition of trustees."

I will ask your Honors to note some additional authorities on this point, as to the question of jurisdiction to appoint trustees under our statutes, where the right of the Court of Chancery is in question.

"To receive the rents and profits of lands, and a use of any person during the life of such person, term, subject to the rules prescribed in the first article of this title," which necessarily excludes all accumulations for general purposes, such as in the English law for a charitable purpose.

How, then, is this general, forcible language to be avoided? I submit, it can only be avoided by an exception, defeating its plain intention and words. The legislature has not declared that any such exception, nor said anything implying it. I will refer to the case of *Williams v. Williams* (4 Seld., 525, 552); and interpolate an exception has been supposed by some to be established. With the judgment in that case I am — all of us will agree that it was right. It is in the court that authority is said to be found justifying holding that trusts for charity are exempt from the rule as to trusts. I contend, however, that that case is regarded as controlling, because it was decided, in a majority of the opinions of all the judges who heard the case, and has since been followed by the courts to which it was presented, and has since been followed by the court of last resort and elsewhere.

Judge DENIO.—I do not see, Mr. Noyes, that there is anything to do with the statute you were referring to. It only relates to personal property, and the statute covers real property.

Mr. NOYES.—I was going to point that out. I was suggested by some that it had something to do with this.

Chief Judge COMSTOCK.—Then, it has nothing to do with it.

Mr. NOYES.—Then I shall not discuss it now; the case was of personal property only. I shall refer to it in the argument. I was about, however, to observe that the *Williams v. Williams* is sustainable upon other grounds. The bequest of \$6,000 to the trustees of the Presbyterian Church at Huntington was clearly valid, because the Church was incorporated under a statute under which it was incorporated. And so the bequest of \$6,000 to the trustees, as a fund to educate poor children, was also valid.

create the exception to the rule, and sustaining it in respect both of real and personal property, as I shall show by and by. In other words, the common and statute law of England, while it forbade perpetuities as a general rule, tolerated and regulated them as to charitable uses; perpetuity being most frequently the essence of donations for such purposes. But there was no such general statute as that now under consideration, abolishing all uses and trusts except those which do not embrace gifts to charities; and there never has been such an act to my knowledge passed in England. Besides, the Thellusson act (39 and 40 Geo. III, ch. 28), does not contain any negative words, nor anything declaring that all trusts or accumulations, other than such as were authorized by it, were abolished. It was evidently intended only to apply to the existing state of the laws; and not to repeal the common law as to charities, or the statute of 43 Elizabeth, so far as it was unaffected by the former. It was special legislation growing out of the evils of that particular case, leaving the statute of Elizabeth, that of George II as to mortmain, and as much of Magna Charta as related to it, untouched. Our own statute is entirely different. We have no statute declaring what are superstitious or charitable uses, and what not — no statutes of mortmain. There is nothing, therefore, to sustain them. Does not the statute of uses and trusts, in its plain and general terms, abolish the statute of 43 Elizabeth? Besides this, the weight of judicial authority in this State is against the implication of such an exception, and in favor of giving the words of the statute their ordinary signification. The cases in favor of the exception are, *Kiniskien v. Lutheran Church* (1 Sandf. Ch. R., 439); *Shotwell v. Mott* (2 Id., 46, 52); and *Williams v. Williams* (4 Seld., 554). Those against it are, *Ayres v. Methodist Episcopal Church* (3 Sandf. S. C. R., 351, 371); *Yates v. Yates* (9 Barb., 324, 340); *Morgan v. Masterton* (4 Sandf. S. C. R., 440); *Voorhies v. Presbyterian Church* (17 Barb., 104, 105); *McCaughal v. Ryan* (27 Id., 376); *Wilson v. Lynt* (30 Id., 124). I have arranged these cases in the order in which they arose. It is enough for me to say that a majority of all the judges who have heard this question discussed have been against implying the exception. I will not occupy the time of the court with arranging or classifying these cases. I ought, perhaps, to refer to the opinion in one of them, decided by the Superior Court of this city. (*Ayres v. The Methodist Church, supra.*) This declaration by one of the Revisers, Judge Duer, is quite important:

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most trivial courtesy; and when his friends, if him, were subject to the same penalties."

Now, the statute of 15 Richard II (A. D., 1496) the evasions of the statutes of mortmain by means, and brought them within the operation of into being contemporaneously with the establishment of Chancery; and of course it put a stop to appeals to Chancellors in such cases, if there were any, not appear. (Spence Eq. Jur. of Ch., 442.)

Lord Bacon says (Reading on Stat. Uses), however, using the words "which he has in possession the reign of Edward IV (A. D., 1461); and he occurred in the eighth year of that reign (A. D., 1470) no such instances; for he says: "That by the advice it was thought that the subpoena did not lie against the feoffee, *which was in by law*, but that the case was driven to Bill in Parliament; for no doubt the Court made difficulty in giving any remedy at all, but of particular conscience of the feoffee; but after the Statute, as may appear by the statute made in the reign of Edward IV (whose reign began A. D., 1461), that compulsion should enter into bonds to prove their suggestion, *at that time the Chancery began to embrace too frequently*; yet, nevertheless, it made scruple to give judgment against the heir being in by act of law, though he was plaintiff.

And they were subsequently compelled to give judgment as in the old common law process, which existed in this State.

The first notice of such an application, according to the records, was in the reign of Henry V, which began A. D. 1413, a quarter of a century after the court had been established. (Eq. Jur. of Ch., 443):

"At which time, as we have seen, the greater part of the lands in England were held by feoffees in trust; it was to leave the fulfillment of trusts to the influence of conscience, of honor, or to the coercion of the confessor."

The Ecclesiastical Courts undoubtedly had jurisdiction in such instances. That being taken away, and half of the lands being in the hands of the feoffees in trust, the Court for matters of conscience, was applied to and then entertained. In the case cited by Spence *Dodd v*

causa mortis, or by any other lawful means whatsoever, whether he shall have enjoined upon the bishop that he undertake the charge for a time so that what he wished might be accomplished; or whether he shall have said nothing on this subject; or whether, on the other hand he may have forbidden it, the heirs, as matter of necessity, shall have to do and accomplish that which has been directed, by every means in their power. But they if shall be unwilling to do these things, then the most pious bishops in the district shall investigate these matters, and exhort them to accomplish all things according to the wishes of the deceased. If, however, the testator shall have enjoined the erection of a building, they may do the work within three years, so that it be done; but if he shall have imposed upon them the construction of a hospital, they may certainly compel that to be done within a year, so that this period of time may be fixed as that in which to accomplish the wishes of the testator. For a house may be hired for the latter purpose, and the sick on couches conveyed there until the work of building the hospital shall be completed. *But if anything is directed to be given at once to charitable uses, they [the bishops] may compel these [heirs] to do it immediately*, for this is according to the implied will of the testator, and according to the provisions of inheritance or legacy granted by those who have been thus honorable."

That is the English law of mortmain and uses, exactly as it was administered at the time of the passage of the statute 43 Elizabeth. Such testaments were directed to be proved and administered in a mode pointed out by another edict, before ecclesiastical tribunals only. (Ayliffe's Parergon, 264.) And those containing any bequests to pious uses were among the class of privileged testaments, and were exempt from most of the ordinary rules affecting the validity of other wills. Your Honors will find these privileges set forth in the first edition of Swinburne on Wills (published in 1590), at page 30, which contains the law as it existed at that period, and prior to both the statutes 39 and 43 Elizabeth, as to charitable uses. There are, in fact, precise provisions as to testaments in a series of articles, all of which have diffused themselves through the law of England, and which were invariably acted upon in the Ecclesiastical Courts, where property was bequeathed for the use of the poor, or by any legal means charged with a trust for a pious use. I refer to Godolphin's Orphans' Legacy (3d ed., A. D., 1685), as containing the same rules in substance. One of these privileges is, that, if the will be canceled on its face, "the law doth presume it to be canceled unadvisedly; and so it is in effect

A year after the first statute of charitable uses was passed, and three years before the present statute of charitable uses was adopted in its place, the same rule prevailed as to the next of kin, the Chancery, down to a comparatively late period, hesitating and refusing to entertain a bill in their behalf; and this although the office of executor was treated as a trust. (Spence Eq. Jur. of Ch., 588; Tothill R., 81.)

I maintain further that the Court of Chancery did not, prior to the time of Elizabeth, exercise jurisdiction over charitable uses or trusts, *ad pias causas*, upon INFORMATION, AT THE SUIT OF THE CROWN, as it unquestionably did afterwards. (Spence Eq. Jur. of Ch., 588.) This practice, when it came into general use, prevailed only when there was no trustee, and the trust was indefinite; as to the poor, generally; or when the trustee violated his trust, and attempted to impair or misappropriate the fund of which he was the custodian. The application was then made at the instance of some person, on behalf of the King as *parens patriæ*—usually by the Attorney-General, although in some cases it might be made by a person other than the Attorney-General.

There is no such claim made by the Attorney-General in the present case. His answer states that the People whom he represents "are strangers to all and singular the matters and things in said complaint contained, and cannot admit or deny the same, and they leave the said complainants to make such proof thereof as they may be advised."

And then they "submit their rights to the Court to make such order and decree as shall be agreeable to equity." No demand or assertion of any interest in the State. No claim of any right in the State to appoint as *parens patriæ*; but, instead of this, an absolute disclaimer of all right to interfere in the controversy, or the subject-matter of it.

Now, the application by the Crown was clearly as a matter of *prerogative*, and substantially an assertion of the doctrine that the goods of persons dying intestate or not well disposed of belonged to the Crown, who could appoint them as it saw fit. But there is no pretense for such a jurisdiction in this State, and I am therefore spared the necessity of showing, as I think I can, that it did not exist in England prior to the statute of Elizabeth so as to uphold bequests to charities void at common law for indefiniteness or for want of a competent trustee. I refer the court to the opinion of Judge SELDEN (1 Am. Law Reg., 546, 547; 14 N. Y., 387), and to that of Judge

DENIO, in the case of *Williams* (4 Seld., 548). I wish to note also the cases of *Attorney-General v. Gl*, *Attorney-General v. Jennis* (Id., 355); and I cite *Mortmain*, 237, and 1 *Daniel Chancery Practice*, 1, *Attorney-General v. Compton* (1 Young & Coll., case against the exercise of such jurisdiction.

Again, I assert that the Court of Chancery did jurisdiction of TRUSTS FOR CHARITIES OR OVER CHARITABLE the statutes of Elizabeth, except in cases where gifts were made by act *inter vivos* to persons *capable of charitable uses or purposes*; or where lands or the by will or deed directed to be applied *for the like purposes* then under its general powers to enforce the performance in like manner as private trusts, and between persons (I refer to Spence on the Equitable Jurisdiction of (1858, and to the Calendars there cited by him.

Now, these were suits by original bill only, between an interest in a specific charity, and competent to sustain the title. Mr. Binney, in his argument in the *Girard Will Case*, for no more, and refers to no case earlier than in 1421, and this was not a contested one. Let me refer for details to Mr. Binney's arguments. His third proposition (Case, p. 108) :

"The defendants are entitled, upon general principles of the constitution of a court of equity, to have this valid jurisdiction of this court, whatever may be the defects of the legal jurisdiction at present say that, in the case of charitable uses, as before the 43 Elizabeth."

Thus, one who has given the most elaborate examination of any man living, to the whole subject of charitable trusts, claims that such was the jurisdiction of the Court of Chancery to the statute of 43 Elizabeth. He goes on then to show that generally where a trust is valid, it is a matter of principle of equity, and has been so for ages, that the trust is protected and enforced by a court of equity. It would be time to go over them all, but none of the cases cite a bequest, general and indefinite in its character, or incompetent to take, prior to the statutes of Elizabeth. He is seen by reference to the Calendars which he cites by the beneficiaries or other persons having an interest in the trust, protection against the trustee. The effort was made

that the decree in *Elmer v. Scott* (Choice Cases in Chancery, 155; Girard Will Case, 126), was made in the 24th Elizabeth, *before* the statute of charitable uses, upon ordinary and judicial equity in Chancery; thus showing that Chancery must have had some general jurisdiction over charitable uses prior to the statute of Elizabeth. The case referred to is this:

"One Symons, an alderman of Winchester, sold certain land to Sir Thomas Fleming, now Lord Chief Justice, then recorder of that town, and this was upon confidence to perform a charitable use, *which the said Symons declared by his last will that Sir Thomas Fleming should perform*. The bargain was never enrolled; and yet the Lord Chancellor decreed that the heir should sell the land, to be disposed according to the limitation of the use."

Now here, there *was* a competent trustee, Sir Thomas Fleming, and there is nothing to show that the trust was vague or indefinite. I mention this case for the purpose of showing that every one of the authorities cited by Mr. Binney should be critically examined with reference to the character of the trust, and the language of the court in passing upon it.

He says, with Sir Francis Moore, that this decision was "before the statute of Elizabeth of charitable uses, and this decree was made upon ordinary and judicial equity in Chancery."

But the question is not whether the court did not in some instances exercise jurisdiction over trusts for charities, but whether it sustained those which were so vague and indefinite as to be void at law, and where no competent trustee was appointed, or any other equivalent provision made for enforcing them, independently of the statute of Elizabeth.

Your Honors will see, by looking into Bridgman's edition of Duke, and comparing it with the original, that some of the cases cited by Mr. Binney, as showing the existence of the jurisdiction prior to 43 Elizabeth, are erroneously stated in point of time, and that the trusts were definite, and that there *was* a competent trustee in each instance. Among others he mentions *Elmeley Lovett* and *Bratlington Sussex* as *before* 37 Elizabeth (Bridgman's Duke, 359; Duke, 32, 38); but there is nothing in the original Duke to show that these cases were decided at so early a period. On the contrary, the presumption is against it, and that they were adjudged long after the statute, and as to the last one, it is clear that it was a proceeding by inquisition under the statute of Elizabeth. They are reported in the original Duke, under the head of "Decrees," which Bridgman changes to "Adjudged

Cases," omitting the time which immediately follows the original edition, thus: "*5 Caroli Primi Rotulo primo*: cases, two of which were proceedings by commission and the first case cited thus:

"Elmeley Lovett in *Com.*, *Sussex*. Lands given to a parish, for the use of the poor, repair of the church, and other charitable uses to be done in the parish, decreed."

That this was also a proceeding under the statute, its being stated to be *in the county (in comitatū)* and equity was never thus distinguished. Besides, it was stated to be to the parish—a competent trustee—and the statute thus defined.

The other case is thus stated:

"Bratlington in *Sussex*."

"An inscription upon the donor's tombstone directed to a charitable use was found, in *hæc verba*. The court proceeded accordingly; and is a very good precedent."

This was also a proceeding under the statute, the word "found," which properly distinguishes the case from the proceedings by the commissioners and jury, but was never applied in a Court of Chancery. Besides, this gift was not valid at common law; as an inscription upon a tombstone to be imputed to the sleeper beneath it, as his own, for the charitable use was, does not appear, and it is not that an indefinite trust, or one without a trustee,

In the original edition of Duke, two other cases follow that last cited; and they were both before the statute 43 Elizabeth. They are separated from the first in Bridgman's Duke (p. 633), and thus the example of them is confounded. The earliest of these is *the case of Worcester*, Duke, 38, Bridgman's Duke, 634, an appeal from the commissioners, before Lord Keeper, a quarter of a century after the statute of Elizabeth.

Mr. Binney also cites *Howard's Case* as Anno 141, Bridgman's, 136, but this was after the statute, and was, doubtless, in a proceeding upon it; as it concerned the imposition of a charitable use by a husband on his executors and administrators of his wife—at common law, and so stated in the report. No doubt the efficacy of the statute could have compelled

before the statute 43 Elizabeth, for want of corporate capacity to take the lands. But, on examination of that case (pp. 385, 389), it will be seen that the grant was only void in part, and was valid as to two-thirds of the land held *in capite*, and that the decree was in fact made upon a *compromise*; that the plaintiff was competent to sue, and the heir at law acceded to the wish of his ancestor as to the whole of the lands, and assented to a decree to convey accordingly.

This case is also found in the Chancery Calendars (vol. 1, p. 81, No. 54), and appears to have been a bill to "establish donations," filed by "Thomas Parker and others, in behalf of themselves and other inhabitants of the town of Brentwood, Essex," and the lands were granted in aid of a former grant of lands by royal license, for the establishment of a free grammar-school in that town, and for other purposes. There was, therefore, in this case also, a legal and definite trust, a competent trustee (which was an incorporated grammar-school), and the suit was brought by persons interested in the due execution of the trust.

Without going into all the other cases noticed by Mr. Binney at length, I may be permitted briefly to notice one or two more.

In *Babington v. Gull*, cited by him (from 1 Cal. in Ch. LVI) as having been decided one hundred years before the statute of Elizabeth (Girard Will Case, p. 129), the complaint was that the plaintiff's mother had placed 600 marks in the hands of the defendant for the purpose of founding a chantry, of which the plaintiff and his heirs were to be the patrons. On looking into the bill it will be found that it was filed by *Babington himself* as patron of the chantry to compel its establishment under a royal license which had been granted, but which the defendant refused to execute.

So, in *Wakering v. Bayle* (1 Cal. in Ch., LVII), a bill filed to compel the defendant, a feoffee in trust, to make an estate in lands to the Hospital of St. Bartholomew, to find a priest to sing perpetually, &c., and to office in a chapel made at the cost of one of the feoffors. The plaintiff was Master of the Hospital, and sued *in its behalf*, and the answer admitted the feoffment and trust.

Lyon and Wife v. Howe and Kemp, also cited by Mr. Binney (from 2 Cal. in Ch., XLIV.) as of the reign of Edward IV, was a bill by the *executors* of the feoffor, who had by will declared the uses of a feoffment of the defendants in trust, to find a priest for a particular church, and making an aisle and porch therein, the mending of a highway and the marriage of five poor maidens. The suit was against the feoffee, who was the trustee, for aliening the trust fund.

Here there was a valid trust, a competent trustee and plaintiffs authorized to protect the trust property.

Baggs v. Sompney, also cited, is the same as *Baggs and others v. Sumpner*, already mentioned, where the plaintiffs sued in trust for the parish; and although Mr. Binney does not notice and may not have known it, it is the same case reported in Tothill (p. 129), which he had previously cited for another purpose.

In *Buttlett and Purchas v. Fitch*, the plaintiffs sued as churchwardens, and the trust was for repairing the parish church of Lyndsell; and Mr. Binney observes, after citing the case, "No trustees, and complainants not a corporation to hold lands;" but there is no evidence of this in the *Calendars* (vol. 1, p. 96), and I am at a loss to know whence he derives his authority for this conclusion. It is entirely clear that the churchwardens were competent trustees of the fund.

In *Blenkinsopp and Salkeld v. Arondersonne*, the trust was of "an annuity of £8 for certain paupers and a schoolmaster in the parish of Burch." (Cal. in Ch., 101.) Mr. Binney remarks at the foot of his citation "no trustees." Why, the plaintiffs sued in an official capacity—one of them is described as "clerk"—"clericalis"—and they were undoubtedly the beneficiaries under the trust, and the defendants were the claimants under the creator of the trust. The same objections may be made upon the next three cases. (*Bocking Parish v. Fytche and Goodwin, Churchwardens*, vol. 1, p. 134; *Barington Parish v. Tychner and College*, vol. 1, p. 141; *Careton and others v. Blythe*, Id., 159). In each of these the parish was the trustee; and in two of them the trust was for the parish poor, and the parish which assented to the trust was the plaintiff. So *Christ Church vicar and Churchwardens within Newgate v. The Parish of All Saints* (Girard Will Case, 181), was the case of a legacy of £4 per annum claimed by both parishes. Mr. Binney says there were "no trustees," "and apparently an indefinite charity." There is nothing said about it in the *Calendars* (vol. 1, p. 218). Again (p. 132), *Fairford v. Jenkins and others, Inhabitants of the manor of Oldsenth* (1 Cal. in Ch., 291), is the same remark, but nothing is said about it in the *Calendar*. So in *Gillingham v. Edward and others* (Cal. in Ch., 376), and in *Goodson and others v. Minday and others* (vol. 1, p. 378). These remarks are not warranted by the *Calendars*. In the first two cases the parishes were the trustees, and there is no statement in the one last cited that "the trustees were unknown." So, at page 135, *Rycardee and others for themselves and the Inhabitants of Rodborough v. Payne and others* (vol. 2, p. 203).

"Bill to protect a charitable donation * * * in the time of Henry VI were given to the church inhabitants of Rodborough, for the performance of a chapel of ease to said parish, but which defendants forfeited to the Crown, being given for *superstition*."

Here there was a competent trustee, and the duty was, that the use was superstitious. So in *Thorplington v. Jarvies* (vol. 3, p. 169), the statement "indefinite charity," is an inference only, and anything stated in the Calendar.

And so in regard to all the cases cited by him from which he quotes, I do not find anything showing not a definite trust, and that there were not persons having a legal or equitable interest; either in it or in superintending its appropriation to the object devoted; or as beneficiaries under it. The trusts are not attempted to be given in the Calendar. The object of the bills is stated in brief terms, in the names of the plaintiffs, and of the defendants, and ought that appears, every one of the charitable trusts is definite and certain. There is not a single case prior to the time of Elizabeth to be found in the Calendar examined almost every case and find that most of them are by parties having some interest in or control over the property and legally competent to appear in court and litigation and application to the use to which it had been devoted. I invite attention to the numerous cases cited by Mr. Selden, and the remark made by one of the judges of the Court of Chancery.

"All the elaborate research which has been given has failed to prove that the Court of Chancery, in the time of Elizabeth, ever assumed to establish a bequest, or clear its object if made to no one in particular, or body incompetent in law to take. If any of the reports of the Record Commissioners of England, or the description of those cases given in a note in *Girard's Executors* (1 How. S. C. R., 165), fails to show, Selden, then Justice of the Supreme Court, in *Calder v. Bull*, 1 Am. Law Reg., 545.)

These cases, and those earlier than the time of Elizabeth, are dismissed with the remark fitly made in the preface of the Calendars in which they are published:

"From those proceedings it appears that the chief business of the Court of Chancery in those early times did not arise from the introduction of the uses of land, according to the opinion of most writers on the subject; very few instances of application to the Chancellor on such grounds occurring among the proceedings in Chancery during the first four or five reigns after the equitable *jurisdiction* seems to have been fully established."

Even after the statutes of Uses and Wills, it was held that, where a feoffment or devise was made to a person having capacity to take to a charitable use, though indefinite as to objects; as for the poor of a particular place, the feoffment or devise was good at law. Whatever jurisdiction Chancery had exercised in such cases seems to have been suspended, and the parties claiming that the estate was divested if the use upon which it was held was not performed, or that the trust was invalid, brought an assize, or other proper real action and "made out their case as well as they could at law;" as was said by one of your Honors following Lord LOUGHBOROUGH, in the case of *Owens v. The Missionary Society Methodist Church* (4 Kern., 393, 394; see Spence Eq. Jur. of Ch'y, 589; *Attorney-General v. Bowyer*, 3 Ves., 714, 726). Mr. SPENCE says:

"It seems, however, that no bill could have been sustained to establish a charity which was *void at law*, for want of a sufficient devisee, prior to the statute 43 Elizabeth."

And he cites the opinion of Lord NOTTINGHAM, then Lord Keeper of the Privy Seal, in an anonymous case reported in Finch. (1 Ch. Cases, 276; 27 Car. II., A. D., 1687; See Shelford on Mortmain, 277, note.) There one Prat devised his houses to St. John's College, being tenant *in capite*, and the corporation misnamed, which was a void devise to pass the lands, and so on former proceedings certified to by all the judges. The Lord Keeper notwithstanding, decreed it a good appointment for a charitable use *within* the statute 43 Elizabeth. It was then objected that if so, the process and method appointed by the statute ought to be had, viz.: a commission and inquisition and decree by commissioners, and so to come at last to a final decree by the Lord Chancellor, but not to sue by original bill, as in the case. But the Lord Keeper decreed the charity, "though before the statute, no such decree could have been made."

Judge DENIO. — Is there a preamble to that statute?

Mr. NOYES. — There is a preamble to that statute, and I have it here in the original Duke.

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The report seems to have been taken from Baron WILK's manuscript, and resolutions of a similar character, in some respects, are found in Moore's Reports (559), where it appears they were adopted in 41 Elizabeth, and they undoubtedly led to the repeal of the statute of 39 Elizabeth and the passage of that of 43 Elizabeth, because of the defects pointed out in the former. They differ materially from those in Duke, and are translated thus :

"Note, that on St. Simon's and St. Jude's day, in the year 41 Elizabeth, I, with Cooke, Attorney-General, by order of ROBERTON, Keeper of the Great Seal, applied to the two Chief Justices POPHAM and ANDERSON, for their decision on several points under the statute of 39 Elizabeth, cap. VI, which authorizes commissions to redress deceits and breaches of trusts of lands and effects bestowed for charitable uses. And the said Chief Justices and Attorney decided on these points :

"*First.* That although the bishop of the diocese is one of these commissioners by the express words of the act, still it is not necessary that he should be present at the execution of the commission ; but if the commission be directed to him and several others, giving to them all and to several of them authority as to five or four, those five or four may proceed without the bishop ; still, if the commission be not directed to the bishop, all is void.

"*Second.* That if the commission be directed to a vacant see, that need not be the metropolitan, because the bishop of the diocese is not named, but a commission then issued without naming any bishop is good ; and as a bishop may be created before the execution of the commission, this will not take away the force of the commission, but the commissioners will proceed notwithstanding.

"*Third.* If the commissioners decree a lease or feoffment to be void, it is void in interest and estate. And if the Chancellor or Keeper of the Seal afterwards decree the estate to be good, this is again good in interest ; *but it seems that the Chancellor cannot make any decree, unless the former decree of the commissioners be contrary to equity.*

"*Fourth.* That where a lease is made in fraud of charitable uses, and is afterwards assigned to one who had no notice of the fraud, for a good and valuable consideration, still the commissioners have power to decree the assignment void as well as the original lease.

"*Fifth.* That the commissioners may decree the mesne profits which have been withheld for a long time back, to be repaid by the party, his executors or administrators, who received them for these purposes and misapplied them—just as well as they may order for the time to come.

"*Sixth.* That the word 'given,' in the proviso hospitals, &c., in towns corporate, extends to a gift as well as to gifts before the statute.

"*Seventh.* That the commissioners cannot by deprivation of churchwardens or others for a charity may decree land to a body politic, capable, mortmain, whether the lands be held *in capite* or the Queen is bound by the statute on this point to establish lands in natural persons and their heirable uses.

"*Eighth.* That the commissioners have power to order such corporations situate without corporate town or make orders for those who are in the same county by Parliament by private acts incorporated for charities cases where their private acts did not provide any form.

"But note, that, after this decision, the said Chancery with other judges, changed their opinion and the commissioners could not decree the lease of land to a person without notice and for a good cause thus they certified their opinions in Chancery this

Chief Judge Comstock.—That is under the 39

Mr. Noyes.—Yes, sir.

Chief Judge Comstock.—Do the two statutes

Mr. Noyes.—They do, in many respects, but the last enumerates the charities that are validated by the statute of 39 Elizabeth was repealed by 43 Elizabeth Codex, 1114). That of 43 Elizabeth, cap. IV, is

"An act to redress the misemployment of land and of money, heretofore given to charitable uses."

After reciting that—

"Whereas, lands, tenements," &c., "have been limited, appointed, and assigned, as well by the Queen's Most Excellent Majesty and her Most Noble Progenitors, as to well-disposed persons; some for relief of aged," &c. "A long list of uses which are deemed charitable. (ed. of 1876) is the provision of the statute in relation to the Ordinance, to which I have adverted

"Provided also, and be it enacted by the authority

neither this act, nor anything therein contained, shall be any way prejudicial or hurtful to the jurisdiction of the Ordinary, but that he may lawfully, in every cause, execute and perform the same, as though this act had never been had or made."

And this was full seventy years before the statute of distributions — the Ordinary having jurisdiction, as already stated, over trusts and of assets and property devoted to pious uses by will or distributable for such uses in cases of intestacy.

Whether the purposes of the framers of the act were such as I have imputed or not, the adjudged cases show that the statute performed these objects; and that in interpreting it, and by force of it alone, the commissioners and the Court of Chancery adopted most of the rules regulating gifts to pious uses which had prevailed in the Ecclesiastical Courts, and held those good which at common law were void. (See Opinion of SELDEN, J., 14 N. Y., 399.) I say, therefore, that it was adjudged to have introduced a new set of principles in the administration of charitable uses, as well by commissioners under the statute as upon original bills in Chancery, and relieved such uses from the stringest rules of the common law. And I submit that this is demonstrated by the authorities to which I shall now call the attention of the court.

I refer first to Nelson's *Lex Testamentaria* (ed. of 1724), at page 137. He was the author of the Chancery Reports, and of many other works of considerable merit, and was a laborious and voluminous writer. This is the second edition, and I think that a book published at that period by one familiar with the then existing state of the law, may well be regarded as crystalizing the rule as it was then understood, with substantial accuracy. Now, he says:

"Where lands, rents, goods, or moneys are given or devised to any of the purposes following, it is accompted a gift or devise to a charitable use (naming those in the Statute of Elizabeth), and the use shall be good, where the donor or testator had a capacity to give or devise, and was entitled to such an estate as he had though the conveyance is defective.

"1. Either in reference to the party, as by misnaming him, or not well naming him.

"2. In the execution of the estate, as where there is no livery and seisin to a feoffment; no attornment to a grant of a reversion; no surrender to the uses of the will where a copyhold is devised; or a defective recovery by a tenant in tail, who devised the estate tail to a charitable use.

"3. *Where the will itself is void in law.*

"For in all these and the like cases, the Statute 4, supplies the defects, and *though they cannot* yet they are good limitations and appointments of re the very words of the statute."

This is also substantially affirmed in 1 Burn's by Phillimore), p. 317 (a), and the same view is statute; that it makes wills good, which were prevented the heir and next of kin from succeeding.

Let me refer to some of the cases cited by Nelson, that of Damas (Moore, 882, Duke, 72, Bridg which came up in 1615, fourteen years after the death.

"A devise to a charity is good, notwithstanding law; as where a *feme covert* was entitled to a debt to her former husband, and devised part of it in that though the will was void in law, yet it was a intent within the statute; so that, if there were tate's estate or of her own, the charity shall be su

Now, this was a proceeding under the statute. commissioners held the charity good, and on appeal ELLESMERE said:

"Albeit the will of the lady were void at law, yet it will serve for a declaration upon the statute for that if there be assets of that estate, or of his own execute it, the use shall be supported; *for the good administratrix are all to go and be employed to charity and children can have no property nor prehem under the charity of the Ordinary.* It was confessed that was made by the commissioners the estate would there was assets, and therefore there was negligence of the estate."

"Wherefore," the report concludes, "Damas was the £400 to the charitable use." And this was the statute of distributions that Damas was con £400, merely by force of the statute of Elizabeth.

Judge DENIO.—Do I understand you to say that was under the statute?

Mr. NOYES.—Yes, sir; most distinctly. And that to have changed the rule, and authorized the giving

and effects to some person other than the Ordinary, and also that it would sustain a charity void but for that statute. It could also repeal, and in many cases was held to have repealed, the statute of wills (Boyle on Charities, 21), or any other statute conflicting with it, and to change the common-law rules of succession. It is clear that there were no means of enforcing the charity except under that statute, else the ordinary remedy by bill or by information would have been adopted. And this method of disposing of the assets took the place of the disposition by the Ordinary to pious uses, to the extent of what was necessary to supply the charity; and this is expressly given as the reason, showing that the next of kin had no right to the assets, except from the charity of the Ordinary.

To show the extent to which the rule was carried, the case of *Attorney-General v. Syderfin* (1 Vern., 224; 1 Eq. Cas. Abr., 96, pl. 8), may be cited, which came up in 1683, a long time after the one already referred to. In that case no written title to the fund was found, nor any appointment discovered, which, even under the ecclesiastical law, would have carried it to the Ordinary, or to the Crown as *parens patriæ*.

There, by will, a charge of £1,000 was made on a manor, to be applied to such charitable uses as the testator *had*, by writing under his hand, formerly directed; but no such writing was found. The Attorney-General, at the relation of the Governors of Christ's Hospital, towards which the testator was alleged to have expressed "good intentions"—said to be the pavement of a place somewhat warmer than most men desire—filed his bill, claiming that the money should be applied for the benefit of the "mathematical boys" of that institution—the King, "in whom the application of the charity was," having so manifested his pleasure. The defendant answered that he believed the direction had been canceled and revoked; for, after making the will, the testator had charged several sums upon the land, and the whole estate would scarcely amount to answer all the charges, and the heir would be disinherited and left without provision. The Lord Keeper said:

"It is no question but the charity being general and indefinite (*the writing being not to be found*), the application of this money is now in the King, and his Majesty having declared his pleasure," &c., he thought it could not better be laid out. He cited *Frier v. Peacock* (*sub nomine, Attorney-General v. Mathews*, 2 Levinz, 167), in that court, where the testator had given several charities by his will, and devised the surplus for the good of poor people forever; and a bill

solely at his expense. By a singular perversion, however, of grammatical construction, it was held that the words 'limited and appointed,' which are in fact merely descriptive of some of the modes whereby property might then, as now, be given or conveyed, were in equity endowed with an extraordinary efficacy. They were considered as curing all such defects as the want of livery of seisin and attornment, which were therefore in charity cases wholly dispensed with. It sustained a remainder without a particular estate to support it."

I will call your attention to the case which he cites: *Platt v. St. John's College* (Duke, 77; Bridgman's Duke, 379), decided in 1638, thirty-seven years after the statute of 43 Elizabeth was passed. This was a bill by the Master and Fellows of the College to carry into effect the will which devised the lands to them by a wrong name, after a life estate to the wife, for "maintenance of the scholars there." Lord Keeper COVENTRY said:

"Although the college was incorporated by another name than the devise was to them, and therefore might not be capable of it, yet the devise is good to them by the said statute: also, if the heir avoid the estate tail against the wife, at law, yet the remainder to the college shall remain good and be a remainder without a particular estate, *which by rules of law cannot be*, but these defects in cases of charitable uses, are made good by that statute, by a benign and favorable interpretation thereof for maintenance of charity, as it is in the cases upon statutes for piety and charity."

Now this was not a proceeding by commissioners under the statute, and yet the statute gave the court all its authority to disinherit the heir (who had entered to avoid, and at law was entitled to avoid, the devise), and to confirm a void devise. I say further, that the statute, benevolently construed so as to disregard all settled rules, was adopted by the Court of Chancery as furnishing the rules by which all charitable devises and bequests utterly void or insufficient for want of certainty, were to be upheld in equity. And hence the general impression and the frequent *dicta* — if not judicial determinations — that all the powers of the Court of Chancery to sustain such devises and bequests, were derived from that statute; which was an embodiment, in effect, of all the rules of the Papal Ecclesiastical law in regard to privileged testaments. It applied to gifts to charitable uses not deemed superstitious, after the Reformation towards the close of the reign of Henry VIII, and separately enumerated in the first section of that act. This further appears from its provisions, some of which I shall consider for a moment.

I need not stop to consider all the cases referred to, as they fully sustain the position which I maintain. I ought, perhaps, to refer to two of them.

Rivett's case was decided in a proceeding upon the statute 43 Elizabeth. There, "a copyholder of land in fee deviseth the same to a charitable use (for the relief of Stow market), without a surrender. The commissioners made a decree for the land, and upon the appeal the decree was confirmed; *for although it is a void devise by the common law*, yet it is a good limitation and appointment of land to a charitable use, and it shall bind the heirs, *but not the Lord of his fine.*"

The case of *Attorney-General v. Andrews* (1 Ves., Sen., 225), decided in 1748, where Lord HARDWICKE, alluding to the cases which regarded the statute of Elizabeth as dispensing with the statute of wills as to copyhold estates devised in charity, said:

"Perhaps if these determinations were now originally to be considered, courts of law and equity would not have gone so far; *and it may be wished it was altered*; as it is subject to the same inconvenience as a devise of freehold lands. But I cannot set up *fanciful distinctions*; nor does that, being the case of a trust, make any difference."

In regard to the whole of this class of cases, I would remark here that the statute 43 Elizabeth, in all modes of proceeding, whether before the commissioners under it, by bill in equity, or by information at the suit of the Attorney-General, was held to have made a new rule, and to sustain a charity which was void at common law for the want of some indispensable prerequisite. No case, justifying the practice before the statute, was pretended to exist.

Boyle continues: "So a devise to a corporation for charitable uses was looked upon in the same light, notwithstanding devises to corporations were expressly excepted out of the statute of wills. Such a devise could not, in the face of that statute, be declared good as a will, but the act under consideration was said to validate and authorize the disposition by way of appointment or declaration of trust."

For this he cites, and I refer to, *Flood's case* (Hobart, 136; Duke, 73; Bridgman's Duke, 370; *S. C.*, *sub nomine De Layd's case*, 1 Eq. Cas. Abr., 95, Apl. 6), decided in 1615, where the devise was to the wife for life; and after, to her daughter for life, and then to the Principal, Fellows, and Scholars of Jesus' College, Oxford, to found a scholar of his blood there; and it was held that the devise was void as against the statute of wills, which did not allow corporations to

assets, not only before any other legacies, *but even before debts*; because it was assets in equity, which were disposable by that statute, which ordains them to make recompense; and the equity of the statute was held to be above the equity of the Chancery."

Citing Duke on Charitable Uses (186), being the last page of Sir FRANCIS MOORE'S Reading on the statute (Bridgman's Duke, 191), and he remarks, finally, that this rule was changed by Lord Chancellor COWPER and others, and brought down, as Lord ELDON said, "to something like common sense."

I now call the attention of the court to the following cases, where the bequest or devise was wholly uncertain, and yet held good under the statute 43 Elizabeth:

Steward v. Jermyn, in 1598 (Duke, 79, Bridgman's Duke, 360), where one having lands and goods, appointed by his will, that the same shall be sold to maintain a charitable use, but did not appoint by whom the sale shall be made. The Lord Keeper, on appeal to him, confirmed a decree for a sale by one J. S., appointed by the commissioners, and the proceeds to be applied to the charitable use, according to the donor's wish.

Wingfield's case, in 1629 (Duke, 80, Bridgman's Duke, 374). Money given for the good of the church of Dulk; held a good gift, notwithstanding these general words.

Goffe v. Webb, in 1602 (Duke, 80, Bridgman's Duke, 361). Hunt seized in fee of the rectory of Haynes, devised the same to be sold and the money to be distributed unto twenty of the poor of his kindred; held good, although it did not appear he *had* any "poor kindred."

Fisher v. Hill, in 1612 (Duke, 82, Bridgman's Duke 484). Mr. Bridgman, probably on the authority of Tothill (p. 29), says it was "in Chancery." Holds that:

"When no use is mentioned or directed in a deed, it shall be decreed to the use of the poor, although the feoffees be gentlemen living out of town, and not inhabitants within the town."

Judge DENIO. — Were all these cases decided under the statute of Elizabeth?

Mr. NOYES. — Many of them expressly appear to have been, and I have no doubt they all were, and in many cases an instrument in which there was a plain and palpable defect, which rendered it wholly void, was held to create a valid charitable use by virtue of that statute. I refer to *Stoddard's case*, in 1605, as being almost precisely

a legacy be lapsed in law, yet it shall subsist in equity for a charity by virtue of the statute 48 Elizabeth :

"An information was exhibited by the Attorney-General for the performance of a charity given by a *codicil* annexed to the testator's will, by which he devised that *what should remain and the residue of his estate and effects*, be given for encouraging such non-conforming ministers as preach God's word in places where the people are not able to allow them sufficient and suitable maintenance, and for the encouraging of such as are designed to labor in God's vineyard as dissenters, and appoints two persons to have the appointment and disposal of the said charity; *both of which persons died in the lifetime of the testator.*"

Two questions arose : first, whether both the trustees to whom the disposal and appointment of the said charity were given, dying in the lifetime of the testator, this charity was not gone, and in the nature of a lapsed legacy. Lord Chancellor King said :

"The substance of the charity remains, notwithstanding the death of the trustees before the death of the testator; and *though at law it is a lapsed legacy*, yet in equity it is subsisting; and here is a sufficient certainty of the testator's intention to revive it, *the intention, therefore, of the party is sufficiently manifested that this charity should continue*, within 48 Elizabeth, cap. 4. It has been held that if the tenant in tail devise a charity, though no recovery is suffered, yet that it shall take place and be effectual as an appointment under 48 Elizabeth."

And he cited the principle of the statute as interpreted and applied in the cases of *Attorney-General v. Rye* (2 Vern., 453), and *Same v. Burdett* (Id., 755), and he does not contend for it on any other ground than the obligatory force of the statute.

The second point which arose there, was whether this was a superstitious use within 1 Edward I, cap. 14; "non-conforming ministers" and "dissenters" being such general words, as that they comprehend any persons however opposite to the Church of England. In regard to this the Lord Chancellor said :

"This cannot be a superstitious use within the statute, but the dissenters here meant are protestant dissenters acting under the Toleration Act (1 W. & M., ch., 18.)"

And he decreed the residuum to be disposed of *in præsenti* and not in a perpetual charity, and ordered a scheme to be laid before him for that purpose. The report in *Equity Cases Abridged* "(Charity," A. pl. 14th) has this addition as part of the will :

the charity, that the estate was given to persons incapable of taking in succession. Lord Keeper HENLEY said :

" But the constant rule of the court always has been, where a person has a power to give, and makes a defective conveyance to charitable uses, to supply it as an appointment, as in *Jesus' College (Collinson's) case* (Hobart, 136). * * * The only doubt is, whether the court should supply the defect for the benefit of the charity under the statute of Elizabeth, and *I take* the uniform rule of this court *before* and after the statute of Elizabeth to have been, that where the uses are charitable and the person has in himself full power to convey, the court will aid a defective conveyance to such uses."

Such was undoubtedly the rule *after* the statute, but I think I have shown that it was not the rule *before*. I refer to one other case (*Attorney-General v. Sedgwick*, 1 Eden, 487), decided in 1760, where an attempt was made to compel a devisee to increase a legacy to a charity, an amount " not exceeding £100 being left to be applied in his discretion," and he applying only a portion of that sum. Lord Keeper HENLEY said :

" It is true, and I am sorry for it, that there are old precedents in this court where, by a *perverse* and *mistaken* construction of the statute of Elizabeth, this court enabled persons to give to charities who had no power to do so by law ; and it is as true that these precedents not only injured private families but became a public nuisance, which called upon the legislature to interpose and stop them. But I found the equity of this court liberal and impartial, and no respecter of persons, and, please God, I will leave it so."

I have now laid before the court some of the evidences which have guided me in arriving at my conclusions in this case. I have examined them with care and stated them with fidelity. In my judgment they lead only to one result, and I submit that the principles and authorities cited establish, that general and indefinite trusts for charities, such as are sought to be sustained in this case, were only maintainable in England by virtue of the prerogative of the Crown and the statutes 39 and 43 Elizabeth. There is no case, to my knowledge, before those statutes, nor any warrant except that given by them or claimed as the privilege of the Crown, for sustaining indefinite trusts for charities. I have read every word in *Duke*, where the contrary doctrine would be found if it ever existed, and do not find any such case there. And, further, I assert, that, as our Court of Chancery possesses only the ordinary jurisdiction of Chancery over trusts, and the prerogative of the Crown cannot be exer

I maintain however, that the final bequest at the close of the codicil of October 15th, 1838, is also void. It is wholly uncertain as to the sum bequeathed, and as to the beneficiaries. It does not appear whether the societies who are to take are incorporated or not. If the latter, then it is void within the ruling in *Owens v. Missionary Society Methodist Episcopal Church* (14 N. Y., 380), because unincorporated. Besides this, it is indefinite and uncertain as to what societies, and where they are located; and there is no mode of selection provided for, if the executors refuse to act, or die; and having renounced they cannot make the selection. I refer again to *Attorney-General v. Hickman* (2 W. Kelynge R., 4, pl. 4; 2 Eq. Cas. Abv., 193, title "Charity," A pl. 14), as being conclusive on this head; for there it was decided that if the party to whom the discretion was confided, died, that duty could not, except under the statute 43 Elizabeth, be conferred upon another. Jarman on Wills (Perk. Ed., Vol. 1, 196) contains the principle and cites some authorities, to one of which I will refer. The case of *Williams v. Kershaw* (5 Cl. & Fin., 111), where it was held that:

"A direction by a testator to his trustees to apply the residue of his personal property to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, and for no other use, intent, or purpose," was void for uncertainty. Again, the amount to be appropriated under this provision depends on, and is to be ascertained by, the previous application of a portion of the estate, according to the directions of the first codicil to the establishment of a dispensary; failing which it is impossible to determine the amount set apart to general charity; and the bequest necessarily falls. (*Chapman v. Brown*, 6 Ves., 404; *Atty Gen. v. Davis*, 9 Id., 535; *Limbey v. Gurr*, 6 Madd. Ch., 151; *Atty Gen. v. Hinman*, 1 Jac. & Walker, 270; 1 Jarman on Wills, 205; Boyle on Charities, 78-82; Tudor Char. Trust Act, p. 70, § 70.)

We claim, therefore, that the justice at special term erred in supposing, that if the devise and bequests for the dispensary failed, the funds to be devoted to that purpose sunk into the residue of the estate, to be applied under the last codicil to general charity. (Boyle on Charity, 419, 420; *Gravenor v. Hallum*, Ambler, 643; 1 Jarman on Wills, 206.) Why, the very language of the last codicil expressly excludes any such inference. It says:

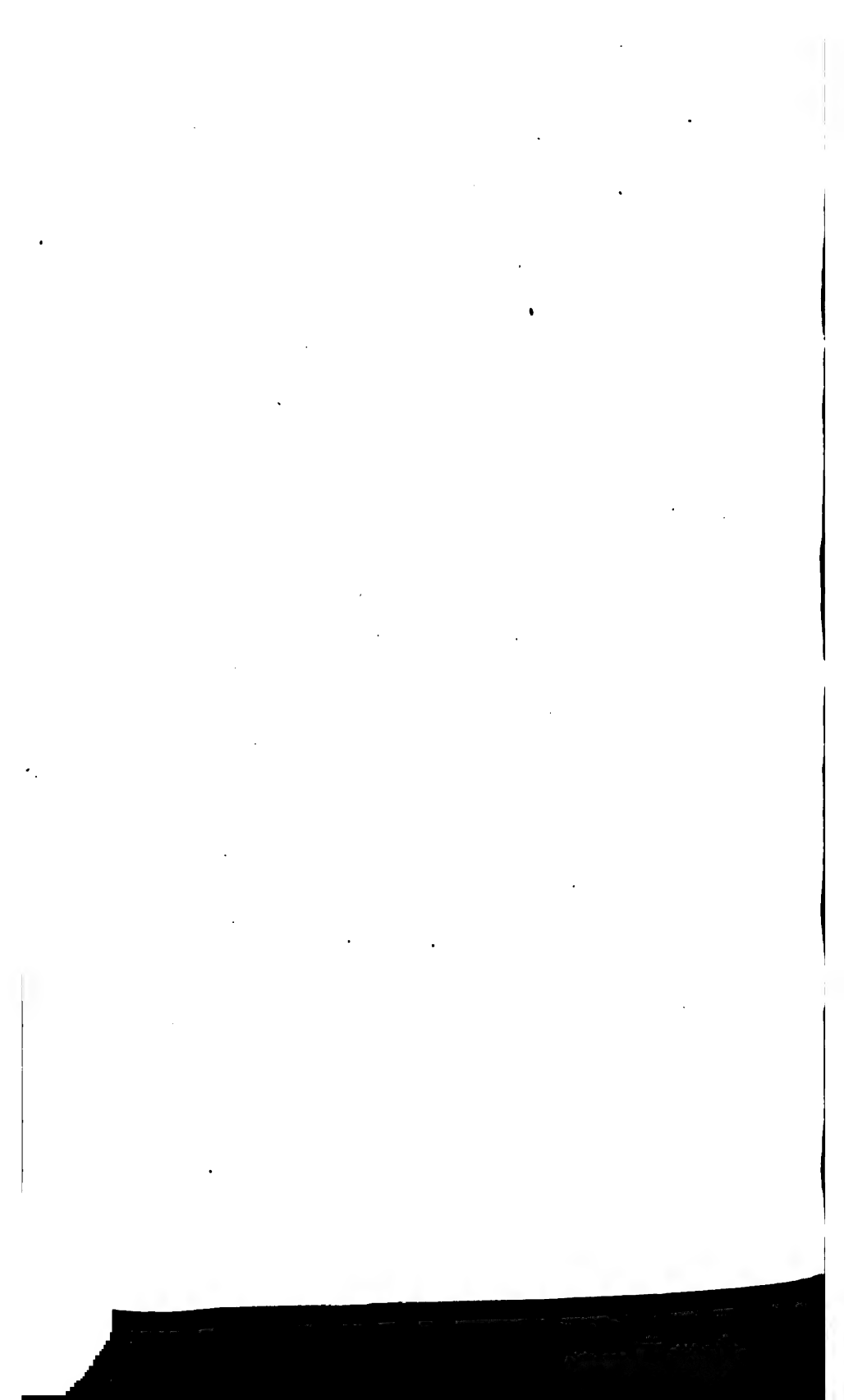
"In the second place, after satisfying the provisions of my will in regard to the dispensary mentioned in my will, or in the first codicil thereto, I give and bequeath all my estate then remaining, if any there

shall be," &c., leaving no doubt that the testator devote to general charitable purposes any portion what might remain after the dispensary was established apart for its perpetual maintenance, and that would be any. Again, it was a part of the residue, that was devised and bequeathed to the dispensary; and it is well settled "that a residue has once been bequeathed as a residue, but of * * * * A part of the residue, of which will not accrue in augmentation of the remainder of resuming the nature of residue, devolves as in

I refer to Ward on Legacies (32), and case also *Floyd v. Barker*, 1 Paige R., 480, 482; *Skinner v. Swanst. R.*, 565; *Chiplyn v. Cresswell*, 2 Ede

But even if the entire estate should be ascertained by special term, still the sums to be applied under the time when the application is to be made, are at the discretion of the executors; and this cannot be renounced. No individual or society has a right to bequeath, or could compel the performance of it for their behalf. It has been shown that in such cases the Chancery has no power to uphold the trust (*Fennell v. Beekman*, 21 Barb. S. C. R., 565), and I have and hope I have proved, that the English Chancery has power to maintain such a trust independently of the law.

The matters which I have thus far discussed in much time, I shall not trouble the court further with the remaining propositions contained in my points; and I indulge in allowing me to engross so much of attention with which I have been heard, I respect the interests of my clients in its hands.



INDEX.

A.

ABATEMENT.

[*Of Proceedings for Debtor's Discharge.*]

See BOND, 3.

ACCUMULATION.

1. A testator, without violating any law, may not only suspend the absolute ownership of his estate during the continuance of any two lives in being at his death, but may dispose of the income annually as it accrues during this period of suspension. He may also give vested legacies, and provide for their payment at future definite periods. It is no violation, therefore, of the statute against accumulations, for a testator, after rendering his estate inalienable for two lives, to give pecuniary legacies, payable at future periods, in such manner as to show that he intended they should be paid exclusively from income as it should accrue, leaving the corpus of the estate to

SMITH.—VOL. IX. 81

pass unimpaired legacies. *Ph*

2. If, in such a case, there is no inference that the testator intended an accumulation, although this accumulation is not executed independently of the will, but is affected by the executors' surplus of income year among them thereto.

AC

[*Ca*

See DEATH CAUSE
MORTGAGE OF
MUNICIPAL C

AI

A bequest of real estate out in lands to aliens who are in session and

APPORTIONMENT.

See TAXES AND ASSESSMENTS, 18.

ATTACHMENT.

[Against non-resident.]

1. Under the proceedings against a non-resident debtor, all creditors at the time of issuing the first warrant of attachment against him, are entitled to come in and share in the distribution of his estate, whether they be residents or non-residents of this State or the United States, and without regard to the place where the debt was contracted. *In the Matter of Bonnaft*,90
2. Such right is not divested by the creditor's being a party to a *concordat* or composition with creditors, made in France, where the debtor resided, and confirmed by its judicial tribunals, which provided that the debtor should be free in his person and his property.*id*
3. Whatever may be the effect of such a *concordat* in respect to the future acquisitions of the debtor, it does not discharge the claim of any creditor to share in the existing property of the debtor.*id*
4. It seems that proceedings under the French bankrupt system, never effect the absolute discharge of the debtor, but that its extent depends upon the interpretation of the composition between him and the creditors. *Per DAVIES, J.*.....*id*

BANK

See DEB

BAN

[

See A.

BANKS AND C.

1. It is the duty of the court under the will to distribute a dividend and eighty per cent, and to sell or to postpone the sale of choses in judgment, or to postpone the judgment, as the judge has, postponed the judgment. *Hollister Bank*
 2. Such postponement of choses in judgment to delay a judgment for one hundred days, is the other as
 3. The case *Bank* (22 N. H.) and explain the case. *See A*
- BE
- Where a real estate is divided into two parts, and one part is invalid, the legatees of the other part are entitled to the whole.

goes to the next of kin. *Beckman v. Bonsor*,298

See CHARITABLE USES.

TRUSTS.

WILL.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promissory note, payable on demand, with interest, is a continuing security: an indorser remains liable until an actual demand; and the holder is not chargeable with neglect for omitting to make such demand within any particular time. *Merritt v. Todd*, 28
2. Whether, however, the lapse of time, or a failure to pay interest at the customary periods, may not subject the holder of a note after transfer to a defence existing in favor of the maker against the first holder, *Quere*, *id*
3. A statement in the written warrant of a municipal corporation for the payment of a sum certain at a fixed time to E. S. or order, that the same is payable "out of any funds belonging to the city, not before specially appropriated," and "chargeable to general city fund," does not deprive the instrument of the character of a negotiable promissory note. *Burr v. Sims*,570

See FRAUDS, STATUTE OF, 1.

MUTUAL INSURANCE.

VENDOR AND PURCHASER, 6.

WILL, 14, 15.

BOND.

1. The sureties in a bond conditioned for the diligent prosecution of his application for a discharge

by a debtor, under section 12 of the act to abolish imprisonment for debt and to punish fraudulent debtors (ch. 300 of 1861), are liable although such prosecution failed by reason of the inability of the County Judge, before whom it was to be had, to discharge his duties. *Cobb v. Harmon*, ... 148

2. In case of the disability of a County Judge, before whom such proceeding has been commenced, it may be continued before the nearest County Judge or Justice of the Supreme Court. *id*
3. The death of the prosecuting creditor, after notice of the debtor's application for his discharge, does not abate the proceeding. *id*

BOUNDARY.

See DEED, 1, 2, 5, 6.

BURDEN OF PROOF.

See PRINCIPAL AND AGENT.

C.

CARRIER.

1. A common carrier of money from bankers in the interior to a bank in New York city, having no notice of the ownership, except what is implied from the address of the package, is authorized to treat the consignee as entitled to control the manner of its delivery. *Sweet v. Barney*,335
2. Any delivery which discharges the carrier as between him and the consignee, is good as against the consignor. *id*

3. Accordingly, where an express company entrusted with a package of money, addressed "People's Bank, 173 Canal street, New York," by the direction of the bank, delivered the package in a distant part of the city to its agent, from whom it was stolen, *held*, that the consignor to whom the package belonged, could not maintain an action for its non-delivery..... *id*

CASES COMMENTED UPON EXPLAINED OR OVERRULED.

1. *McCullough v. Maryland* (4 Wheat., 116); *Osborn v. United States Bank* (9 Wheat., 738), and *Weston v. The City of Charleston* (2 Pet.), examined and distinguished. *People v. Commissioners of Taxes and Assessments*, 192
2. *Andrew v. Dieterich* (14 Wend., 36), overruled in part. *Fussett v. Smith*, 252
3. *The Bank of Rome v. The Village of Rome* (19 N. Y., 20), considered and distinguished upon one point. *Starin v. The Town of Genoa*, 439
4. *Manning v. Tyler* (21 N. Y., 567), considered and distinguished. *Dagal v. Simmons*, 491
5. *Reciprocity Bank* (22 N. Y., 9), considered and explained. *Matter of the Hollister Bank*, 509

CHARITABLE USES.

1. A gift to charity which is void at law for want of an ascertained beneficiary will be upheld by the courts of this State, if the thing given is certain, if there is a com-

petent trustee to administer the charity it is not void. *Be*

2. In other trusts as well as in those which are subject to the execution of the will. The execution of the will made it. The exercise of charity, is a jurisdiction.

3. A charity is left under the discretion of the donor to the discretion of the donor and the fund. The defect is in the power.

4. A gift to be applied to the use of the port of the females, with the exception of the tutors have cannot be

§

C

See 1

(

CONF

§

CONSIDERATION.

See FRAUDS, STATUTE OF, 1.
 VENDOR AND PURCHASER, 4.
 WILL, 14, 15.

CONSIGNOR & CONSIGNEE.

See CARRIER.

CONTINGENT LIMITATION.

See WILL, 12, 19, 20.

CONTINUING SECURITY.

See BILLS OF EXCHANGE AND PRO-
 MISSORY NOTES, 1, 2.
 FRAUDS, STATUTE OF, 2, 5.
 VENDOR AND PURCHASER, 4.

CONTRACT.

[*Assignability of.*]

See STATE PRISONS.

[*Reformation of.*]

See FRAUDS, STATUTE OF, 4.
 PRACTICE, 3.

[*Rescission of.*]

See VENDOR AND PURCHASER, 6.

CONSTITUTIONAL LAW.

1. A State loan reimbursable at the pleasure of the State after twenty years, has no term of payment until the legislature has fixed it by law. *The People v. Denniston*,247

2. Where such a loan was made under a law passed before the Constitution of 1846, for the benefit of the Long Island Railroad

Company, which was bound to redeem the stock, an act giving to its holders the option of having it made payable in 1876, is not in violation of the constitutional prohibition of the loan of the State credit to corporations. id

3. The act (ch. 375 of 1852) authorizing any town of Cayuga to borrow money to aid in the construction of a railroad upon the written consent of two-thirds of the resident taxpayers, is constitutional and valid. *Starin v. The Town of Genoa*,439

4. The act is not within the objection that it submits any legislative question to the town. All that is submitted is, whether it is expedient for the town to exercise a new power conferred upon it absolutely by the legislature. id

5. The legislature may constitutionally designate, or provide for the designation of, Justices of the Peace to sit in the Courts of Sessions by any law general or special. *Nelson v. The People*,... 293

6. Accordingly held, that a Court of General Sessions was properly constituted where the justices were designated by name in a special act of 1860, and were deficient as to one of the qualifications required by the general law (ch. 470 of 1847, § 34). id

See TAXES AND ASSESSMENTS, 2, 13.

CORPORATION.

The statute (ch. 172 of 1850) to prohibit corporations from interposing the defence of usury, deprives them of the right to recover

back money paid by them in excess of legal interest. *Butterworth v. O'Brien*,275

See DEATH CAUSED BY NEGLIGENCE, 2.
WILL, 24.

COSTS.

Where an appeal is dismissed in this court with costs, general costs follow whether the appeal be from an order or a judgment. All appeals here stand on the same footing. *White v. Anthony*,164

COUNTY JUDGE.

See BOND, 1, 2.

COURT OF GENERAL SESSIONS.

Justices of the sessions are not required to take any official oath other than that which they take as justices of the peace. *Nelson v. The People*,293

See CONSTITUTIONAL LAW, 5, 6.

CONVICT LABOR.

See STATE PRISONS.

CREDIT OF THE STATE.

See CONSTITUTIONAL LAW, 1, 2.

CRIMINAL LAW.

See NEGLIGENCE, 1.

PERJURY.

VENDOR AND PURCHASER, 1, 9.

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DEATH

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personal representative of the deceased, which is wholly distinct from and not a reviver of the cause of action which, if he had survived, he would have for his bodily injury.....*id*

4. Whether a person entitled to the services of another, as a parent to those of a child, may not maintain an action against one by whose negligence, resulting in death, he has been deprived of such services, reserved as an open question in this court.....*id*

See DAMAGES.

NEGLIGENCE.

DEBTOR AND CREDITOR

1. The property in notes or bills transmitted to a banker by his customer to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor. *Scott v. The Ocean Bank in the City of New York*..... 289

place where the remittance was received, the customer continued to draw upon him as before at an office in another State, where the banker did not suspend business..... *id*

4. These facts create the relation of debtor and creditor in respect to money received by the banker, but are insufficient to charge him with responsibility for a bill previous to payment, and consequently to vest him or his assignee for a precedent debt, with the property in such bill. *id*

See ATTACHMENT.

DEDICATION.

See DEED, 1-3.

DEED.

[*Construction of.*]

1. As between grantor and

3. The grantor held to have dedicated such street as between him and his grantees, although his map represented it as continuing through the land of an adjoining proprietor, which closed it against any highway in one direction, and such adjoining proprietor, never, in any manner, assented to the continuation of the proposed street, nor was any part of the street adopted as such by the public authorities.....*id*
4. The grantee of all the lots on both sides of the street thus designated, held entitled to the exclusive possession of the proposed street against ejectment by the grantor.....*id*
5. A boundary line running from a post on the north bank of a creek "thence down the same and along the several meanders thereof to the place of beginning," which was also on the bank, includes the bed of the stream to the centre. *The Seneca Nation of Indians v. Knight*, 498
6. So held, although the boundaries of the tract after crossing the stream several times, recrossed it to reach the commencement of the boundary in question.....*id*

DOMICIL.

See MARRIAGE, 3.
WILL, 6, 8.

DOWER.

1. A widow is not dowable of land in which her husband has only a vested remainder, expectant upon an estate for life. *Durando v. Durando*,.....331

SMITH.—VOL. IX. 82

2. This is the estate devised, &c.
3. The will in *Coke*, this point by deed.

See I

1. A new tainable, Revised ; only with first judgment not with affirmation court of I County I

&

I

&

I

See HUI

EQUITABLE

Where a executors it is appropriate provisions tended succession doctrine c applies, all sale is no

Dodge, Executor of Phelps, v. Pond, 69

See TRUSTS, 2.

EQUITABLE MORTGAGE.

See FRAUDS, STATUTE OF, 2-5.

EVIDENCE.

1. The town clerk's minutes of the proceedings of a town meeting are conclusive. Parol evidence cannot be received to show that the next annual meeting was in fact appointed, by the majority of the voters, to be held at a different place than that stated in the minutes. *The People v. Zeyst*, 140
2. Though in actions to try the title to an office, parol evidence is in general, admissible to impeach the certificate of the party holding it, an obstacle arising from the averments contained in a public record can, it seems, only be removed by a direct proceeding to correct the record. *id*
3. A prospectus, distributed by a life insurance company, and importing that it was careful to prevent forfeitures, is inadmissible to vary or control an express provision in a policy for life by which it determined upon the failure to pay the premium on the first day of each succeeding year. *Ruse v. The Mutual Benefit Life Insurance Company*, 516

See DAMAGES.

MARRIAGE.

MUTUAL INSURANCE.

PERJURY.

PRINCIPAL AND AGENT, 3, 5.

WITNESS.

EXECUTOR AND ADMINISTRATOR.

See ACCUMULATION, 2.

DAMAGES.

DEATH CAUSED BY NEGLIGENCE, 3.

EQUITABLE CONVERSION.

TRUSTS, 3.

WILLS.

F.

FALSE PRETENCES.

See VENDOR AND PURCHASER, 1, 7.

FELONY.

See VENDOR AND PURCHASER, 1.

FINDING BY REFEREE.

[Construction of.]

See LEASE, 2.

FOREIGN LAW.

See DEATH CAUSED BY NEGLIGENCE, 1, 2.

WILL, 7.

FRAUDS, STATUTE OF.

1. The words "for value received" in a guaranty of a promissory note, are a sufficient expression of the consideration within the statute of frauds. *Miller v. Cook*, 495
2. A parol agreement that a mortgage on land, in terms securing \$200, shall stand as security for a further advance, is void. *Stoddard v. Hart*, 556

3. The insertion of a clause in the bond enlarging it so as to include such subsequent advance the mortgage remaining unchanged, does not affect the operation of the mortgage, nor enlarge the meaning of the words therein, "according to the condition of said bond.".....*id*

4. Though equity may enforce specific performance of an agreement to make a mortgage, it will not give to an executed agreement of the parties contemplating no further act by either, any different effect than that which the law attributes; nor will it reform the writing to make an agreement of a different effect from that which the parties intentionally entered into.....*id*

5. Money was advanced upon the security of a mortgage with a parol agreement that further advances should be made: that the amount thereof should be inserted in the bond, and that the mortgage should be considered as security for what should thus be inserted. After the mortgage was recorded, a further advance was made and the amount inserted in the bond: *Held*, that the mortgage could not be extended to cover such subsequent advance even as against a grantee of the premises who took them for a precedent debt, and with full notice of all the facts.....*id*

G.

GUARANTY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2.

See FRAUD
JOINT

See SALE A

E

&

HUSBAND

1. The mortgagee with the act for rights of 200 of 184 her right c
gage. *Por*

2. Where with her husband mortgage of the facts only interest, but of words for her right t

See DAMAGES
DOWER.
MARRIAGE
PERJURY.
SALE AND
VENDOR

INDEX

See C
T
V

INDIAN TRIBES.

See TAXES AND ASSESSMENTS, 12-18.

INTEREST.

See INSURANCE OF LIFE.

WILL, 4.

WITNESS.

INTESTACY.

See WILL, 6-8, 17

INSURANCE OF LIFE.

1. One procuring insurance upon the life of another cannot recover upon the policy without proving an interest in the life insured. *Russ v. Mutual Benefit Insurance Company*,516

2. Such was the rule at common law. The statute, 14 George III, chapter 48, prohibiting insurance where the party taking the policy has no interest in the life insured, is merely declaratory.....*id*

See EVIDENCE, 3.

J.

JOINDER OF PARTIES.

1. The fraudulent vendee of goods and his assignee thereof for the benefit of creditors, are liable to a joint action by the vendor to recover possession. *Nichols v. Michael*, 264
2. A joint action lies under section 120 of the Code against a lessor and one who is a party to the

lease, and therein guarantees the performance of the lessor's covenants. *Carmon v. Plase*,... 286

See MORTGAGE OF CHATTELS, 2.

JUDGMENT.

See PRACTICE, 2, 4, 5.

L.

LANDLORD AND TENANT.

See JOINDER OF PARTIES, 2.

LEASE.

LAPSE.

See WILL, 19.

LAW AND FACT.

See LEASE, 2,

MUTUAL INSURANCE.

NEW TRIAL.

LEASE.

[Surrender of]

1. The unexpired term for a year in a lease for three years, may be surrendered by parol. The statute (2 R. S., p. 134, § 6) relates to the estate of the tenant, and not to the terms of the instrument by which it is created. *Smith v. Devlin*,363
2. A finding, stated by the referee as one of fact, that there had been no surrender, construed by the help of his finding of law, as meaning only that there had been no surrender by writing.....*id*

LEGACY.

See WILLS.

LEGITIMACY.

See MARRIAGE.

M.

MARRIAGE.

1. The presumption that an intercourse, illicit in its origin, continued to be of that character, may be repelled by a contrary presumption in favor of marriage, and of the legitimacy of offspring, although the circumstances fail to show when or how the change from concubinage to matrimony took place. *Caujolle v. Ferrié*, .90
2. Thus in support of the legitimacy of a child, the facts that the father desired to marry the mother, and that, although he might have maintained a meretricious intercourse without opposition from his family, he abandoned his home and parents to live with her, are some evidence that he did contract a marriage, in fact, prior to the birth of his child.....*id*
3. The presumption is not overcome by the fact that, having declared and caused to be recorded his purpose to solemnize the marriage by the public acts prescribed by the municipal law of his domicile, such purpose was not shown to have been consummated, and there was an entry upon the record of such declaration importing that nothing came of it.....*id*

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See HUEBA
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SALE A

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See DEATH
NEGLI

1. A men
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lien, and which is not shown to be essential to the security of the corporate creditors..... *id*

taken
v. *Eighty*
pany,

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

N.

NEGLIGENCE.

1. To eject a passenger from a railroad car, while in motion, is so dangerous an act that it may justify the same resistance on the part of the passenger as to a direct attempt to take his life. *Sanford v. The Eighth Avenue Railroad Company*,..... 343

2. Where the passenger is liable to ejection in a proper manner, for refusing to pay fare, his resistance to the attempt to expel him without stopping the car, does not present a case of concurrent negligence on his part..... *id*

3. Where, in such a case, the principal is responsible for the act of his agent, he is, it seems, also responsible for any circumstances of aggravation which attended the wrong..... *id*

See DEATH CAUSED BY NEGLIGENCE.
WATERCOURSE.

NEW TRIAL.

Where after a trial by jury a new trial is granted by the court below, this court having no power to review a question of fact, will affirm the order, if it can be maintained upon any view to be

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N

See TAXE

See BILLS
SOE
MORT
PRINC
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Of

See Cou

OFFICE AND OFFICER.

See EVIDENCE, 2.
MILITIA, 1.
NEW YORK CITY.
PRINCIPAL AND AGENT.

P.

PARTIES TO ACTION.

See JOINDER OF PARTIES.
MORTGAGE OF CHATTELS, 2.
MUNICIPAL CORPORATION.

PERJURY.

1. A witness who testifies falsely as to a material fact, is guilty of perjury though he was not a competent witness in the case, and was especially inadmissible to prove the particular fact to which he testified. *Chamberlain v. The People*,85
2. So held, where, in an action for divorce, the husband—his wife having borne a child—testified that he had no sexual intercourse with her during marriage.*id*
3. It seems (per JAMES, J.), that in an action between husband and wife, either party is, since the amendment to the Code in 1857, a competent witness against the other, in general though inadmissible to prove the particular fact of non-intercourse.*id*
4. Upon an indictment of the husband for perjury, after divorce, the wife is a competent witness to prove that she has had no sexual intercourse with any other person.*id*

PERPETUITIES.

See ACCUMULATION, 1, 2.
TRUSTS, 1.
WILLS.

PLANKROAD AND TURN-PIKE ACT.

See REMEDY.

PLEADING.

1. An answer is sufficient to set up the defence of usury to an action on a promissory note where it states an agreement, upon the application for a loan, to give more than legal interest, and that the lender deducted from the amount for which, with interest, the note was made "about enough, as he said, to buy a barrel of flour, which amount, as the defendants believe, was seven or eight dollars." *Daglal v. Simmons*,...491
2. The case of *Manning v. Tyler* (21 N. Y., 567), considered and distinguished.*id*

See APPEAL, 3, 4.
JOINDER OF PARTIES.
PRACTICE, 3.

PRACTICE.

1. Where the return to an appeal served on the respondent is imperfect, his remedy must be sought by a special motion to the court. Rule 7, which allows the entry of a common order dismissing the appeal, applies only where there is an entire omission to serve a copy of the return within the proper time. *Bowers v. Tillmadge*168

2. The order making the judgment of this court the judgment of the court to which it sends its remittitur, is an order of course, and the omission to enter it is a formal irregularity which the court below may amend, and which on appeal from subsequent orders will be disregarded in this court. *Chautauqua County Bank v. White*, 347

POWE

• See

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3. Where the complaint was framed in a double aspect, praying damages upon the breach of a written contract, and also a reformation of the contract if necessary, upon the allegation of mistake, the court should retain the action and give such relief as the plaintiff, independent of any reformation of the contract may entitle himself to, although he may, upon a trial, fail to show himself entitled to equitable relief in the reforming of the contract. *New York Ice Company v. The North Western Insurance Company of Oswego*, 357

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4. So long as a judgment is subject to appeal, and perhaps afterwards, it is, it seems, subject to such correction and modifications, as the court, by which it was pronounced, may see fit to make.

id.

PRINC

1. Under officers of inter per cent railroad exchange corporat in their bonds of nominal it in the to sell *Starin v*

5. It is a mis-trial where no general verdict being rendered, the answers of the jury to specific questions, not covering the whole case like a special verdict, are taken and referred to the court at general term for judgment upon the answers, and the questions of law arising in the case. *Manning v. Monaghan*, 539

2. One v for the discount corporat direct e not a bo the bon defence

3. The p affirmati

sent of the requisite number of resident taxpayers, was, in point of fact, obtained and filed in the county clerk's office, as required by the statute.....*id*

4. The town is not bound by the representation of its officers, upon the face of the bonds, that such assent had been obtained and filed. Such representation is of a fact which goes to the constitution of the agency, and which is of no effect as against the alleged principal.....*id*

5. Where the act required that the officers, to issue the bonds, should first file, with the written assent of the taxpayers, their affidavit that the persons, whose assent were thereto attached, comprised two-thirds of all the resident taxpayers, such affidavit is not evidence of the requisite assent in the absence of a provision of the statute making it such.*id*

6. The case of *The Bank of Rome v. The Village of Rome* (19 N. Y., 20), considered and distinguished upon this point.....*id*

7. Chapter 272 of 1851 gave the authority to borrow to certain officers of the town of Sterling, who are named in the act, upon obtaining the assent of two-thirds of the resident taxpayers appearing on the last assessment roll. It provided for the issue of bonds bearing interest payable annually in 1852, and each of the three succeeding years, and required the supervisors of the county to levy the amount of such interest on the town: *Held*, that chapter 605 of 1853, amending such act by giving the power to the supervisor and railroad commissioners

of the town to issue bonds with provisions and stipulations for the payment of semi-annual interest, operates to modify the entire act of 1851, so as to substitute the year 1853 for the year 1851, and to adapt the other provisions to this change.....*id*

8. Accordingly, bonds purporting on their face to be issued under the act of 1851, by the official successors, in 1853, of the persons named in the act of 1851, and in conformity to the act of 1853, as above construed, are to be deemed valid as against the objection that the power could only be exercised by the persons and in the manner prescribed by the original act.*id*

See NEGLIGENCE, 3.

PRINCIPAL AND SURETY.

See BOND, 1, 2.

PRIVILEGE.

See MILITIA, 2.

PUBLICATION.

See WILL, 1-3.

R.

RECEIVER.

See BANKS AND BANKING ASSOCIATIONS.

RECORD.

See EVIDENCE, 2.

STATE PRISONS.

1. The statute concerning the labor of convicts in state prisons (ch. 460 of 1847, § 77) does not require the contract for their employment to state the precise number. It is sufficient to fix the maximum and minimum, as from fifty to one hundred. *Horner v. Wood*,350
2. A provision in such contract, giving the right to enlarge the time of its continuance from three to five years is, it seems, valid. If otherwise, it is void only as to the additional years, but valid as to the three.....*id*
3. Such a contract is assignable. The position of a contractor for convict labor is not one of public confidence or duty.*id*

STREETS.

See DEED.

SURRENDER.

See LEASE.

SURROGATE'S COURT.

See APPEAL, 1.

SUSPENSE.

[*Of Ownership or Power of Alienation.*]

See ACCUMULATION, 1, 2.

TRUSTS.

WILL, 9, 12, 16.

T.

TAXES AND ASSESSMENTS.

1. Stock in the public debt of the United States, whether owned by individuals or by corporations, is taxable under the laws of the State. *The People, ex rel. The Bank of the Commonwealth v. The Commissioners of Taxes and Assessments for the City and County of New York*,.....192
2. The taxation by the State of property invested in a loan to the Federal Government, is not forbidden by the Constitution of the United States where no unfriendly discrimination to the United States, as borrowers, is applied by the State law, and property in its stock is subjected to no greater burdens than property in general. *id*
3. Whether Congress, for the purpose of giving effect to its powers to borrow money, and of aiding the public credit, may constitutionally enact that a stock to be issued by the Federal Government shall be exempt from taxation, *Quere*.....*id*
4. The cases of *McCullough v. Maryland* (4 Wheat, 116); *Osborn v. United States Bank* (9 Wheat, 738), and *Weston v. The City of Charleston* (2 Pet.), examined and distinguished.*id*
5. Under the statutes of this State relating to taxation, the personal property of a resident actually situated in another State or country is not to be included in the assessment against him. On the other hand, the personal property of a

- non-resident, which is situated here, is liable to taxation with such exceptions only as the statute laws have made. *Hoyt v. Commissioners of Taxes*, 225
6. But these rules apply only to property which is capable of having an actual *situs*, and has one within or without the State. Property merely in transit through the State is not taxable. Debts and choses in action in general follow the domicile of the owner. Ships at sea, if registered at a port within the State, have no *situs* elsewhere, and are to be assessed here. *id*
7. The relator, residing in the city of New York, was assessed in respect to capital invested in business in New Orleans, and in respect to chattels upon his farm in New Jersey: *Held*, that the assessment was erroneous. . . . *id*
8. The goods of a non-resident owner, sent to this State for the purpose of sale, without reinvestment of the proceeds, are not liable to taxation under chapter 37 of 1855, section 1. *The Parker Mills v. The Commissioners of Taxes and Assessments*, 242
9. That act is designed to reach the capital of non-residents employed within this State in a continuous business, and not property sent here only as to a market for sale. *id*
10. Under the Revised Statutes (vol. 1, p. 391), the assessment of land to a person who was neither the owner nor occupant is void. *Whitney v. Thomas*, . 281
11. Where inhabitant it was for the prior to sale and no title
12. Taxes of the (1841), for through in the case of *taraugus* are not the sense levies for objects, usual but laws for poses; meaning cember State and biting ge a limited *niston*, .
13. The act the lands paid tax such sale Indian r valid as a it conflict which the the India disturbed joyment of Congress with the rates only tion rights
14. The act, 1840), and sale and any reserv

Indian occupants is unconstitutional and void.....*id*

15. The lands of Indian tribes were not subject to assessment for taxes under the general provisions of the Revised Statutes. The policy of our laws, until changed by the statute of 1840, regarded the Indians within our borders as distinct communities, not embraced within the administrative arrangement of towns and counties, though resident within their bounds.....*id*

16. But such lands were taxable when the Indian tribes, although actually occupying the Buffalo reservation, were so doing under a treaty which had extinguished their ownership, and provided for their removal beyond the Mississippi within the period at which the purchaser at a tax sale would be entitled to possession.....*id*

17. Lands thus occupied were properly assessed as non-resident lands. The possession which, under the Revised Statutes, would justify their assessment to the occupant, where the owner resided in another town, must be the possession of persons themselves liable to taxation.....*id*

18. The entire Buffalo reservation having been returned for the non-payment of taxes, and the several lots into which it was divided having been subsequently returned for the non-payment of other taxes, the Comptroller was authorized to apportion the taxes upon the whole tract, or portions of it which had been assessed in gross, among the several lots in proportion to their area, treating them as equally valuable in proportion

to quantity; and his sale of the several lots for the taxes as thus apportioned was regular and valid.....*id*

See COMPTROLLER.

TOLLS.

[*Action for.*]

See REMEDY.

TRUSTS.

1. A bequest of a sum of money to be invested in land, of which the rents and profits are to be applied to certain beneficiaries during fifteen years, the land then to be sold and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation. *Beckman v. Bonsor*,.....298

2. And where such a bequest leaves the sum not exceeding a certain limit, in the discretion of executors and the executors have renounced, the gift cannot be sustained as a pecuniary legacy by disregarding the void directions to convert it into land, and then to re-convert it into money. The amount being unascertained, the bequest wholly fails.....*id*

3. An executor who renounces his office, the renunciation being followed by many years of total non-interference with the estate, is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary.....*id*

See CHARITABLE USES.

WILL.

U.

USURY.

See CORPORATION, 1.
PLEADING, 1, 2.

V.

VENDOR AND PURCHASER.

1. The definition in the 2d Revised Statutes, page 702, section 30, of the term "*felony*," when used in a statute, has not so changed the common law as to prevent a purchaser in good faith and for value, obtaining title to goods which the original vendee procured by false pretenses, *Fassett v. Smith*, . . . 252
2. The case of *Andrew v. Dieterich* (14 Wend., 36), in this respect overruled. *id*
3. The possession by a husband of his wife's real estate is to be taken as her possession, so as not to put a purchaser upon inquiry as to the rights of a third person of whom the husband, to cover his own fraud, took a lease, unknown to the purchaser. *id*
4. A creditor who took from his debtor a mortgage declared to be a continuing security for an amount less than the debt, held to have made subsequent advances on the faith of the mortgage, although the original indebtedness was never reduced, but was continually increasing. *id*
5. The fraudulent vendee of goods and his assignee thereof for the benefit of creditors, are liable to a joint action by the vendor to re-

cover possess
chael,

6. Where the negotiable promissory goods, the vendor tender such a rescinding the sufficient for him the trial, and the today of the co
7. It is not fraudulent avoid the sale would sustain false pretense
8. The doctrine reported (18 N. and reiterated

VE

See P

WATE

1. One who, authority, interest of a riparian, absolute regard to the damages consequence of those who are water flow in *Bellinger v. Central Railroad*
2. Where, hence is in tive authority purpose of public utility, compensation, t

the stream is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods.

id

WILL

[Execution of.]

1. The publication of a will may be made in any form of communication by the testator to the witnesses, whereby he makes known to them that he intends the instrument to take effect as his will. *Coffin v. Coffin*,... 9
2. So, too, the testator's request to the witnesses, to subscribe the attestation, may be made through any words or acts which clearly evince that desire to them; and the publication may be incorporated with the request. *id*
3. Accordingly, where one of the witnesses, in the presence and hearing of the other, whose attendance was by the testator's procurement, asked the testator, "do you request me to sign this [the paper lying before them] as your will, as a witness?" and the testator said "yes": *Held*, sufficient as a request to both the witnesses, and as a publication of the will. *id*
4. That the draftsman of the will takes a legacy under it, is suspicious only in connection with other circumstances indicative of fraud or undue influence. *id*
5. Secrecy in the execution of the will, contrived by the testator

himself, regarded as in nowise impeaching it; nor a preference of collateral relatives over his wife, under the proved and presumable circumstances of the case. *id*

6. Whether a deceased person died intestate or not, is to be determined by the law of the place where he was domiciled at the time of his death. That is the law which prescribes the requisites to the valid execution of a will of personal estate. *Moultrie v. Hunt*, 394

7. Our statute (Laws of 1830, p. 389, §§ 63-69) prohibiting the admission to probate of a foreign will of personal estate, unless executed according to the law of the place where it was made, relates only to the case of a person domiciled out of this State at the time of his death. *id*

8. Accordingly, where a citizen of South Carolina executed his will in such manner as to be a valid bequest of personal property according to the law of that State, but not of New York, and subsequently established his domicile and died in this State: *Held*, that he died intestate in respect to personal property within our jurisdiction. *id*

[Construction of.]

9. The statute (1 R. S., 726, § 40) giving, to the persons presumptively entitled to the next eventual estate, income accruing during a suspension of the absolute ownership, and of which no disposition nor valid accumulation is directed, is applicable in respect to the income of personalty only

where such income is derived from some specific fund, or is distinguishable from that of all other property. *Phelp's Executor v. Pond*, 69

10. Accordingly where, as in this case, no interest was given to the residuary legatees in that portion of the estate devoted to the payment of specific legacies, and the latter are payable out of both income and principal, the surplus accruing in any year belongs not to the residuary legatees, but to the next of kin..... *id*

11. The executors held to have no power to anticipate the payment of legacies on a rebate of interest during the period in which, according to the testator's intention, the legacies are to be paid from income. *id*

12. A bequest to executors, of \$50,000, to be applied by them to the erection of a college in Liberia if \$100,000 should be raised for that purpose in this country is void, as depending upon a contingency which may never happen, without any limitation of the period of suspense..... *id*

13. Such bequest is, it seems, also void for indefiniteness as to the object, and because, after the application of the money by the executors, no provision is made as to the ownership of the property into which it may be converted, or for the substitution of competent trustees in place of the executors. *id*

14. An instrument, executed by the testator in his lifetime, declaring his purpose to place \$100,000 in the hands of his son for charita-

SMITH.—VOL. IX.

84

ble purpose
"in accordance
proposition,
my promise
value received
pay \$100,
void as with

15. The document promises 1 when made of a child, where the missee, is not the promisee

16 The willment of a fund of \$5,000 her life. I fore a dividend estate, which upon the death of the son, or at years, such the residuary give the portion of the fund property, to go to the son and grant the disposition of the natives is sion of own the distrib lives, in the period of t

17. Where estate is divided into two parts, is invalid, the legatee goes to the v. *Bonsor*,

18. And where the invalid be ascertained failure of wise, the

- void for uncertainty in the amount. *id*
19. Devise and bequest to the testator's son of real and personal estate for life, to go to his heirs in case he died leaving issue, and in case he should die without issue, to go to the testator's nephews and nieces. The son dying without issue before the testator there is no lapse, but the contingent limitation takes effect in favor of the nephews and nieces. *Downing v. Marshall*, 366
20. Personalty bequeathed to the executors in trust to apply the income to the son's support during life, and the principal to be paid to his issue, passed to the nephews and nieces, under a contingent limitation in their favor of all the real and personal estate devised and bequeathed to the son; the testator having elsewhere in the will referred to this fund as a part of his son's estate, though he had only a beneficial interest therein for life. *id*
21. Under a devise of land, one-third part to the children of the testator's brother A, in equal shares, and one-third part to the children of his brother B, the children of each class take the share belonging to their class as tenants in common. *id*
22. Where, by reason of a legal incapacity but one of the persons of a class can take, that one takes all the estate which the devise, by its terms, gives to the whole class. *id*
23. Where, by reason of their alienage, none of the class is competent to take, the estate does not pass to the residuary devisees, but descends to the heirs of the testator. *id*
24. The will attempted to devise real estate, used as a manufacturing establishment, to the executor in trust, to continue the factory in operation for two lives in being, and upon the death of the survivor of them, to sell the same; the income of the property, and the proceeds after its conversion, to be distributed to one unincorporated association and three corporations, for religious and charitable purposes: *Held*, that the provision failed as a trust to receive and apply the rents and profits of real estate, because the lives on which the trust depended, were those of persons having no interest in its performance, while the statute (1 R. S., p. 723, § 55, subd. 3) requires it to be dependent upon the life of the beneficiary.
2. The trusts attempted to be created are valid as powers in trust, so far as the beneficiaries are competent to take by devise.
3. The provision is void both as to real and personal estate, so far as respects the unincorporated association.
4. The prohibition in the statute of devises to corporations not expressly authorized to take by the legislature, renders void the power so far as it would operate to give the rents and profits of land for the benefit of the corporations not thus authorized. They can take no interest in land under a power created by will.



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